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# Entanglements in Legal History: Conceptual Approaches

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from Europe to the Americas: The Experiences of Lorimier  
in Quebec (1871–1890) and Varela in Argentina (1873–1875)  
| 315–384



MAX PLANCK INSTITUTE  
FOR EUROPEAN LEGAL HISTORY

ISBN 978-3-944773-00-1  
eISBN 978-3-944773-10-0  
ISSN 2196-9752

First published in 2014

Published by Max Planck Institute for European Legal History, Frankfurt am Main

Printed in Germany by epubli, Prinzessinnenstraße 20, 10969 Berlin  
<http://www.epubli.de>

Max Planck Institute for European Legal History Open Access Publication  
<http://global.rg.mpg.de>

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie;  
detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

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Cover photo by Christiane Birr, Frankfurt am Main  
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Recommended citation:

Duve, Thomas (ed.) (2014), *Entanglements in Legal History: Conceptual Approaches, Global Perspectives on Legal History*, Max Planck Institute for European Legal History Open Access Publication, Frankfurt am Main, <http://dx.doi.org/10.12946/gplh1>

## Libraries of Civil Codes as Mirrors of Normative Transfers from Europe to the Americas: The Experiences of Lorimier in Quebec (1871–1890) and Varela in Argentina (1873–1875)

### I. Introduction

American nineteenth century civil codes incorporated legal provisions that originated in Europe. The civil codes of Quebec (1866) and Argentina (1871) did not neglect normative transfers, and many of their compounding elements can be traced back to Europe, where they were originally envisioned as a reaction to local needs. Jurists started to study the content and applicability of codes soon after being enacted in American jurisdictions. Those studies evolved into a *culture of the code*, which eventually evolved into a *reverence of the words* of the written law. That approach praised the codes as preferred objects, and elaborations by jurists were deemed to stay within their limits. Jurists could not freely elaborate criticisms on the code's content, nor develop comparisons between its norms and the changing society.<sup>1</sup> According to this extremely positivistic approach judges were

\* This paper was presented at the Workshop *Entanglements in Legal History* at the Max-Planck-Institut für europäische Rechtsgeschichte (Germany). The drafting benefited from conversations with Abelardo Levaggi, Julieta Marotta de Parise, and Osvaldo Rodolfo Moutin; and from comments by participants and attendees to the abovementioned Workshop, mainly Eduardo Zimmermann. – The author is grateful to Remco van Rhee and Sjef van Erp for their support and guidance, and to Maastricht University for financing a research stay in Argentina during the Spring 2012. On that occasion the author worked at the law libraries of Universidad de Buenos Aires and of Marval, O'Farrell & Mairal. Canadian materials were consulted with the cooperation of the Inter-library Services of Maastricht University Library. The research for this paper was made possible by the work of several librarians, mainly, Nora Gómez, Paula Hermans, and Gonzalo Lopez Martinez. The author is indebted to Assya Ostroukh who triggered his interest on the life and work of Lorimier.

1 TAU ANZOÁTEGUI (1998) 539.

bound to rule according to code provisions.<sup>2</sup> The approach pushed jurists to complete their own libraries with European sources, while their interest was mainly limited to books that codifiers included or used to complete their works.<sup>3</sup> The identification of exact formal sources was therefore soon started, and this paper addresses the interest that jurists in the Americas initially had for formal sources originated in Europe.

The paper focuses on the work of two jurists who worked towards the identification of formal sources. In the early 1870s, Charles-Chamilly de Lorimier started to work in Quebec on what he called the *library of the civil code* (*bibliothèque du Code Civil*). In that twenty-one-volume work he provided, amongst others, the transcription of authorities used when drafting the Quebec civil code. At that same time, in Argentina, Luis Vicente Varela worked on what he also called the *library of the civil code* (*biblioteca del Código Civil*). In a sixteen-volume *opus*, Varela was able to provide readers with reproductions and Spanish translations of the formal sources that the Argentine drafter used in his code. Scholars across American jurisdictions, though not exclusively through *libraries*, also traced formal sources of local codes. All these works were in line with the statement of Joseph-Marie Portalis, who claimed that comparison with rules of other societies assisted jurists in understanding the rules they needed to explain or apply.<sup>4</sup>

The resulting *libraries* of civil codes acted as mirrors of normative transfers. Mirrors are understood as instruments that “give a true description of something else,”<sup>5</sup> a notion that has been of common use for titles of books.<sup>6</sup> Works that *reflect* the law have been welcomed by scholars throughout time. Examples of allusions to law-related mirrors, though not necessarily with the extent that will be given in this paper, are found in the Bible,<sup>7</sup> the Germanic *Sachsenspiegel*,<sup>8</sup> the Castilian *Espéculo*,<sup>9</sup> and, closer in time, in the words of

2 *Id.* at 540.

3 *Id.* at 542.

4 This passage was reproduced in several nineteenth-century works that advocated comparative studies. See, for example, SAINT-JOSEPH (1840) iii.

5 *Mirror, n.*, Oxford English Dictionary Online.

6 *Id.*

7 James 1:22–25, The Holy Bible.

8 For information on the *Sachsenspiegel*, see DOBOZY (1999).

9 The *Espéculo* “aimed to be the mirror of all laws.” (BUNGE [1913] 246). For information on the *Espéculo*, see GARCÍA-GALLO DE DIEGO (1951–1952) and GARCÍA-GALLO DE DIEGO (1976).

Oliver Wendell Holmes.<sup>10</sup> Nineteenth-century *libraries* were able to reflect which, and to what extent, European legal elaborations were transferred to American jurisdictions. The resulting codes became owners of what was transferred, because they forced interaction with local *ethos*. Imported elaborations were absorbed by local legal structures. *Libraries*, acting as mirrors, reflected the original sources used when drafting. Those mirrors served as solutions to entanglements that jurists faced in the Americas when looking behind the text of local codes, when trying to find the origins of their provisions.

Two initial statements are useful. The first relates to *normative transfers*. For the purposes of this paper, they encompass the reception of foreign legislative acts, customs, doctrine, and jurisprudence by a borrowing jurisdiction. Borrowing may be experienced both in an active and a passive way, however. Active borrowing takes place when one seeks a foreign legal elaboration and introduces it to a local legal framework. Passive borrowing takes place when a local legal elaboration is sought after and is introduced into a foreign legal framework.<sup>11</sup> The second initial statement relates to the use that codifiers made of sources. Abelardo Levaggi explained that distinction by stating that material sources (also called ideological or indirect) differ from formal sources (also called literal or direct).<sup>12</sup> The first type encompasses doctrines, ideas, or solutions that may be expressed in archaic or modern terminology. The second type encompasses formulas that limit themselves to expressing or simply translating those ideas. For example, in Argentina, material sources could be extracted from the Roman *Corpus Iuris Civilis* and the Castilian *Siete Partidas*. Those ideas were not incorporated to the civil code of Argentina with their original wording, however. They were incorporated with refurbished words, taken many times from contemporary works that served as formal sources. On many occasions, therefore, formal sources “dressed” with modern language the material ideas that were considered universal.<sup>13</sup>

This paper is divided into four parts and an appendix. Firstly, it describes how codification was achieved in the two jurisdictions. It addresses the work

10 Speeches by Oliver Wendell Holmes (1896) 17.

11 PARISE (2010a) 2.

12 LEVAGGI (2005) 181.

13 *Id.*

of the drafters of the civil codes, and highlights which European sources they used. Secondly, it explains who the two jurists that developed the *libraries* were as well as what their social and legal backgrounds and their main contributions to legal science were. Thirdly, it addresses the two *libraries* independently, describing their structure, contents, and impact on the legal community. Fourthly, it describes the legal context in which the *libraries* developed by first comparing the *libraries* with other works on European formal sources and, then, by addressing the development of positivistic approaches to the study and understanding of law. The last part aims to highlight a pan-American evolution of codification and its legal context. The appendix aims to illustrate the contents of the *libraries* and their reception of formal sources.

## II. The Enchantment of Nineteenth Century Codification<sup>14</sup>

Codification finds its origins in Europe, where it experienced a significant development during the eighteenth and nineteenth centuries.<sup>15</sup> A scientific revolution led the way for codification, originated in Enlightened and Humanistic ideas, and followed by Rationalistic Natural Law theorizing.<sup>16</sup> This revolution advocated a new presentation of laws that replaced existing provisions,<sup>17</sup> while grouping different areas in an organic, systematic,<sup>18</sup> clear, and complete way.<sup>19</sup> In addition, codification suggested the laying out of a plan with terminology and phraseology<sup>20</sup> in a single-fabric consolidated way.<sup>21</sup> Codification then advocated one consolidated body for one consolidated group.

Endeavors on codification spread throughout the Western hemisphere. Europe experienced two seminal codifications in the area of civil law: the drafting of the French Civil Code of 1804 (later called *Code Napoléon*) and

14 The title of this section is drawn from WEISS (2000).

15 See generally, LEVASSEUR (1970) and BERGEL (1988). For a complete study of the previous period, see VANDERLINDEN (1967).

16 LEVAGGI (2001) 185.

17 DÍEZ-PICAZO/GULLÓN (1982) 51.

18 ALESSANDRI RODRIGUEZ/SOMARRIVA UNDURRAGA (1945) 49.

19 CARRÍO (1981) 993.

20 BERGEL (1988) 1084–1085.

21 STONE (1955) 305.

the coming into effect in 1900 of the German Civil Code (BGB, *Bürgerliches Gesetzbuch*). Nineteenth century codification also developed in the Americas, many times building on European sources, though on occasions through cross-pollination of American codes.<sup>22</sup>

Comprehensive attempts towards codification were made in the Americas.<sup>23</sup> There was interest in the region for grasping the panorama of civil law legislation in a succinct and comprehensive way.<sup>24</sup> There was a demand for the examination of ideas existing in other civilized states that had reached codification.<sup>25</sup> By replicating European events, many American jurisdictions replaced their versions of *ius commune* with codified systems of national laws.<sup>26</sup> Those enactments took place in the region mainly by the promulgation of civil codes in the period 1825–1916.<sup>27</sup>

Codification endeavors in Quebec and Argentina share similarities. For example, both jurisdictions enacted civil codes during the second half of the nineteenth century. The codes of both jurisdictions also provided a single fabric for private laws, and provided a single code for a single group. Finally, codifiers in Quebec and Argentina built on European sources, though also on local provisions, and on American codification examples. Codification endeavors in both jurisdictions also reveal certain differences. For example, the code in Argentina repealed prior laws, while its Quebec counterpart preserved continuity of the *ancien* laws. In addition, Argentina had a strong connection with Spain, while Quebec had a strong connection with France and later with England.

22 For example, the Louisiana Code was a source for codifiers in Argentina, New York, and Quebec. In addition, the projected code for New York was influential in Argentina and California. The civil code of Chile provided a third example of cross-pollination, being a blueprint for many codification projects in the Americas. See KNÜTEL (1996), PARISE (2008) 833, and RICHERT/RICHERT (1973).

23 PARISE (2008) 831.

24 Similar claim for clarity was made in France in a nineteenth century work of legislative concordances. See SAINT-JOSEPH (1840) i.

25 STONE (1955) 307, also cited by CAIRNS (1980) 19.

26 BRAVO LIRA (1989) 54.

27 A list of American jurisdictions and the years of effect of their first generation civil codes reads: Louisiana, 1825; Haiti, 1826; Bolivia, 1831; Peru, 1836; Costa Rica, 1841; Dominican Republic, 1844; Chile, 1857; El Salvador, 1860; Panama, 1860; Ecuador, 1861; Venezuela, 1864; Quebec, 1866; Uruguay, 1868; Argentina, 1871; Mexico, 1871; Nicaragua, 1871; Colombia, 1873; Guatemala, 1877; Paraguay, 1877; Saint Lucia, 1879; Honduras, 1880; Cuba, 1889; Puerto Rico, 1889; and Brazil, 1916. See generally MORÉTEAU/PARISE (2009).

## A. Quebec<sup>28</sup>

The colony of Quebec, within New France, was established in 1608 by Samuel de Champlain.<sup>29</sup> Colonizers to that region of the *Saint-Laurent* River came mainly from French provinces of the Atlantic coast, and applied different customs.<sup>30</sup> Royal enactments of 1663 and 1664 stated that New France would benefit from the laws of France.<sup>31</sup> Accordingly, French law<sup>32</sup> was introduced, and mainly the *Coutume de Paris*<sup>33</sup> was the private law of the territory,<sup>34</sup> together with colonial legislation<sup>35</sup> and Royal Ordinances that affected daily life in the colony<sup>36</sup> and that were registered by the Superior Council.<sup>37</sup> Later, and as a result of the Seven-Years War, Britain took control of New France. The territory officially changed sovereignty to the British Crown in 1763, and uncertainty developed around the role of private law<sup>38</sup> when the civil and the common law systems coexisted.<sup>39</sup> The British Crown advocated the introduction of the common law, though its attempts did not prevail,<sup>40</sup> and the main receptions of English law took place in public law and in judicial organization.<sup>41</sup> The civil law was restored to the territory by means of the Quebec Act of 1774,<sup>42</sup> undertaken by the Parliament of Westminster.<sup>43</sup> Those private law principles, however, slowly started to interact with courts and legislative activities that introduced a limited amount of concepts from English law: a bijural system started to emerge in Quebec.<sup>44</sup> This evolution, together with other social changes, demanded a reform of the formal pres-

28 See generally the complete study by BRIERLEY (1968).

29 CAIRNS (1980) 114.

30 *Id.*

31 BRIERLEY/MACDONALD (1993) 7.

32 On French law at the time of transatlantic normative transfers, see BRIERLEY (1994) 105.

33 New France did not apply all dispositions of the *Coutume de Paris*. CAIRNS (1980) 123.

34 TANCELIN (1980) 3.

35 CAIRNS (1980) 123.

36 BRIERLEY/MACDONALD (1993) 10.

37 TANCELIN (1980) 3.

38 BRIERLEY/MACDONALD (1993) 14.

39 CAIRNS (1980) 126.

40 *Id.* at 133.

41 BRIERLEY (1968) 534.

42 On the Quebec Act, see WHITE (1902) 40–41.

43 BRIERLEY/MACDONALD (1993) 16.

44 *Id.* at 17.

entation of the law.<sup>45</sup> Quebec ultimately became a province of the Canadian Confederation on July 1, 1867,<sup>46</sup> and a lack of understanding of civil law and its adaptation to the resulting legal environment persisted.<sup>47</sup>

Quebec adopted the *Civil Code of Lower Canada – Code civil du Bas Canada* (Quebec Code) on August 1, 1866.<sup>48</sup> Codification was expected as a natural and logical development in Quebec because of its antecedents and of the success codification had had in France.<sup>49</sup> The Quebec Code provided an ordered presentation of private laws.<sup>50</sup> It had 2,615 articles<sup>51</sup> and was divided into a preliminary title and four books: Book I “Of persons” (*Des personnes*), Book II “Of property, of ownership, and of its different modifications” (*Des biens, de la propriété et de ses différentes modifications*), Book III “Of the acquisition and exercise of rights of property” (*De l’acquisition et de l’exercice des droits de propriété*), and Book IV “Of commercial law” (*Lois commerciales*).<sup>52</sup> Each book was divided into titles, chapters, sections, and articles.<sup>53</sup> The text was therefore able to end the *legal Babel* that had existed,<sup>54</sup> whilst aiming to assert the private laws of Quebec by referring to an official compilation or doctrinal synthesis.<sup>55</sup>

Codification in Quebec had its distinctiveness.<sup>56</sup> A Codifying Commission was created by an Act of 1857<sup>57</sup> and the technical factors of codification were sought for in its work.<sup>58</sup> Accordingly, the Commission was instructed to transform into a single fabric the laws that related to “Civil Matters and

45 *Id.* at 22.

46 *Id.* at 24.

47 BRIERLEY (1994) 125.

48 See the proclamation of May 26, 1866 by Viscount Monck, available at MCCORD (1870) xlii. See also BRIERLEY/MACDONALD (1993) 24.

49 BRIERLEY (1994) 116.

50 BRIERLEY/MACDONALD (1993) 24.

51 BELLEFEUILLE (1866) 598.

52 *Id.* at lxix–lxxxiv.

53 MCCORD (1870).

54 HOWES (1989a) 109.

55 BRIERLEY (1968) 542.

56 On the political background of the adoption of the Quebec Code, see YOUNG (1994). See also the chronology of codification events in Quebec in BRIERLEY (1968) 581–589.

57 “An Act to provide for the Codification of the Laws of Lower Canada relative to Civil matters and Procedure” (20 Vic. S.C. 1857, ch. 43), reproduced as part of the *Consolidated Statutes of Lower Canada* in MCCORD (1870) xxxiii–xxxvii.

58 BRIERLEY/MACDONALD (1993) 25.

are of a general and permanent character.”<sup>59</sup> They were then instructed to indicate the authorities they used to fulfill their work, and invited to suggest amendments.<sup>60</sup> Their work had to reflect a consolidated image of the living elements of the private law as existing in Quebec.<sup>61</sup>

The Quebec Code was a single-fabric body. That same fabric blended *ancien* civil law principles with principles shaped by Rationalistic and Liberal values that derived from the Enlightenment.<sup>62</sup> The Quebec blend included elements of Canon, English, French, and Roman laws and local provisions.<sup>63</sup> The ideal of one consolidated body for one group was also present in Quebec because the English minority of the territory had since been integrated into a structured and single-fabric system.<sup>64</sup>

There were, however, some differences with other nineteenth century civil codes. The Quebec Code did not expressly repeal all existing prior law.<sup>65</sup> This is a significant element for further law interpretation, and a difference with other codes such as the one of Argentina and the *Code Napoléon*.<sup>66</sup> The Quebec Code was enacted both in French and English, a bilingual aspect that made it similar to the Louisiana Code of 1825, though different from its French counterpart.<sup>67</sup> A final difference is that the Quebec Code, even when using a single fabric, extended to elements of common law and of commercial law. This reflected a significant difference with other civil codes of its time,<sup>68</sup> such as the one of Argentina.

The work of the Codifying Commission extended for six years.<sup>69</sup> Their product was included in eight Reports,<sup>70</sup> the first completed by May

59 McCORD (1870) xxxiv.

60 BRIERLEY/MACDONALD (1993) 26 and CAIRNS (1980) 132.

61 BRIERLEY/MACDONALD (1993) 27.

62 *Id.* at 35.

63 ARROYO I AMAYUELAS (2003) 272.

64 GALL (1990) 172. See also the preface to the first edition of an 1870 edition of the Quebec Code where it read that “English speaking residents of Lower Canada may now enjoy the satisfaction of at last possessing in their own language the laws by which they are governed.” McCORD (1870) x.

65 See article 2613 Quebec Code. McCORD (1870) 412 and HOWES (1989a) 109.

66 BRIERLEY/MACDONALD (1993) 30.

67 *Id.*

68 *Id.* at 35.

69 BRIERLEY (1968) 526.

70 There were eight Reports, one being supplementary. See Civil Code of Lower Canada: First, Second and Third Reports (1865); Civil Code of Lower Canada: Fourth and Fifth

1862<sup>71</sup> and the last by January 1865.<sup>72</sup> These followed the order of the work of the Commission and not that of the Quebec Code.<sup>73</sup> The Commission was composed of judges that took leave during the drafting period. René-Edouard Caron, Augustin-Norbert Morin, and Charles Dewey Day worked under the chairman of the first.<sup>74</sup> Day was Anglophone whereas the two first were Francophone.<sup>75</sup> They had two secretaries skilled in English and French.<sup>76</sup> One of those secretaries, Joseph-Ubalde Beaudry, replaced Morin when he passed away.<sup>77</sup> Commissioners stated that their Reports included “accompanying observations [that] are intended to indicate the sources from which the articles submitted have been derived, and to explain when necessary, the reasons upon which they have been adopted.”<sup>78</sup> The Commissioners undertook a critical examination of local and foreign laws, while they valued tradition, jurisprudential theory, and their intuitive understandings of optimal provisions.<sup>79</sup>

In Quebec “memory was more important than imagination in 1866.”<sup>80</sup> The sources of the Quebec Code were therefore many and the text reflected the law that had applied in the territory until its enactment.<sup>81</sup> The Reports referred to more than 350 different authorities<sup>82</sup> and offered a convenient way of determining the sources of each provision.<sup>83</sup> Together with an internal memorandum by Caron,<sup>84</sup> they showed that the Commissioners worked with an array of local and foreign sources (*e. g.*, English law, Roman

Reports (1865); and Civil Code of Lower Canada: Sixth and Seventh Reports and Supplementary Report (1865).

71 TESTARD DE MONTIGNY (1869) 597.

72 BRIERLEY/MACDONALD (1993) 29.

73 TESTARD DE MONTIGNY (1869) 7 (*preface*).

74 BRIERLEY/MACDONALD (1993) 27.

75 CAIRNS (1980) 139.

76 BRIERLEY/MACDONALD (1993) 27.

77 *Id.*

78 Civil Code of Lower Canada: Sixth and Seventh Reports and Supplementary Report (1865) 6.

79 CAIRNS (1987) 709.

80 BRIERLEY/MACDONALD (1993) 35.

81 MIGNAULT (1935) 108 and RICHERT/RICHERT (1973) 506.

82 BRIERLEY (1968) 552.

83 LAWSON (1955) 50.

84 See the breakdown of sources in BRIERLEY/MACDONALD (1993) 28, n. 96.

law, Scots law, US law),<sup>85</sup> and that French materials were their main quarry.<sup>86</sup> Commissioners also looked into decisions adopted by local courts,<sup>87</sup> and did not limit themselves to a single source for their normative transfers.<sup>88</sup> Their main difficulty was “the care and circumspection required for making a safe and judicious selection.”<sup>89</sup> They provided a new presentation for old provisions selected from many sources<sup>90</sup> because the Quebec Code integrated into one single fabric the laws of the territory while not being subversive of prevailing local legal notions.<sup>91</sup> The Commissioners said in their first Report,

[we] have tried to avoid [acknowledged faults], and have sought for the means of doing so in the original sources of legislation on the subject, in the writings of the great jurists of France as well under the modern as the ancient system of her law, and in the careful comparison of these with the innovations which have been introduced by our local legislation and jurisprudence, or have silently grown up from the condition and circumstances of our population.<sup>92</sup>

## B. Argentina

The current territory of Argentina was formerly a possession of the Spanish Crown. Historically, it has been referred to as *Río de la Plata*, due to the name of the main fluvial artery that crosses through the region. In 1516, Juan Díaz de Solís led the first European expedition that arrived to *Río de la Plata*.<sup>93</sup> During the nineteenth century, local inhabitants replicated other South-American liberating movements, and independence from Spain was declared on July 9, 1816.<sup>94</sup>

The first attempts towards civil law codification in *Río de la Plata* were undertaken in 1852.<sup>95</sup> At that time, the head of the executive power delivered

85 CAIRNS (1980) 145.

86 BRIERLEY (1968) 552.

87 KARPACZ (1971) 534.

88 See the study on sources of the Quebec Code in CAIRNS (1980) 699–712.

89 Civil Code of Lower Canada: Sixth and Seventh Reports and Supplementary Report (1865) 216.

90 CAIRNS (1980) 717.

91 BRIERLEY (1968) 574.

92 Civil Code of Lower Canada: First, Second and Third Reports (1865) 6.

93 ROCK (1987) 8.

94 DOMÍNGUEZ (1861) 398–411.

95 LEVAGGI (1987) 265.

a decree ordering the appointment of drafters that would work on the civil, commercial, criminal, and procedural codes.<sup>96</sup> In addition, the Argentine Constitution indicated that the national legislative branch should deliver civil, commercial, criminal, and mineral codes.<sup>97</sup> Those first interests in codification were interrupted because the Province of Buenos Aires seceded from the rest of Argentina.<sup>98</sup> A reunion would have to wait until a constitutional reform took place in 1860.<sup>99</sup>

The completion of a civil code was delayed until the following decade. The *Código Civil de la República Argentina* (Argentine Code)<sup>100</sup> took effect on January 1, 1871.<sup>101</sup> Dalmacio Vélez Sarsfield (Vélez) had been appointed to draft the resulting code seven years prior.<sup>102</sup> Throughout his life he served as lawyer, judge, professor, journalist, and government minister.<sup>103</sup> The Argentine Code had 4,051 articles and was divided into two preliminary titles and four books: Book I “Of persons” (*De las personas*), Book II “Of personal rights in civil relations” (*De los derechos personales en las relaciones civiles*), Book III “Of real rights” (*De los derechos reales*), and Book IV “Of real and personal rights-dispositions in common” (*De los derechos reales y personales – disposiciones communes*).<sup>104</sup> Books were divided into sections, parts, titles, chapters, and articles. In contrast to its Quebec counterpart, the Argentine Code overruled all related prior laws that had developed during the Spanish colonial period and the early independent period (e. g., *Indiano* and *Patrio* laws).<sup>105</sup>

The Argentine Code included notes for many of its articles. Those notes are not part of the law, and are intended to inform the reader about the genesis of the thoughts of Vélez.<sup>106</sup> They aid the comprehension of articles, in a similar way as legislative history or *exposé des motifs*.<sup>107</sup> The notes are still

96 *Id.*

97 Section 64, Paragraph 11. Spanish text of the Argentine Constitution of 1853 available at ALBERDI (1858) 204. See also TAU ANZOÁTEGUI (1977b) 319.

98 LEVAGGI (1987) 265.

99 TAU ANZOÁTEGUI (1977b) 340.

100 See MORÉTEAU/PARISE (2009) 1143–1145 and LEVAGGI (1987) 266.

101 LEY 340 (1869) 496–905.

102 LEVAGGI (1987) 265. See also CABRAL TEXO (1920a) 156–178.

103 FRAGA IRIBARNE (2000) 580.

104 See LEY 340 (1869) 496–905.

105 See article 22 Argentine Code, *id.* at 508.

106 MOISSET DE ESPANÉS (1981) 448.

107 LEVAGGI (2005) 209.

useful as an additional element for interpretation of codified provisions,<sup>108</sup> and serve as guides when studying articles.<sup>109</sup> Notes can also be useful for determining the juridical, economic, or philosophical position that inspired the Argentine Code.<sup>110</sup> In 1865, Vélez made reference to the existence of notes,

I indicated the concordances between the articles of each title and the current laws and the codes of Europe and America, for an easier and more illustrated discussion of the draft.

On occasions I had the need of including long notes in articles that solved archaic and serious matters that had been under debate by jurists or when it was necessary to legislate in areas of law that needed to be moved from doctrine and turned into law.<sup>111</sup>

The work of Vélez was also a single-fabric body. He had an eclectic approach to law<sup>112</sup> and therefore identified materials from many sources. Vélez worked with legislative acts, drafts of codes, codes, and doctrine that served him as guides.<sup>113</sup> As with other drafters, he used the ideas and codes that existed at the time.<sup>114</sup> He was especially interested – as were Andrés Bello in Chile, Louis Moreau-Lislet in Louisiana, and Teixeira de Freitas in Brazil – in the jurists and works that theorized on modern law while building upon Roman law principles.<sup>115</sup> Finally, Vélez added to those materials the identification of local customs.<sup>116</sup>

Merits of normative transfers should prevail over originality. This idea was defended by an Argentine periodical as early as 1854.<sup>117</sup> Accordingly, codification in Argentina, similarly to that in Quebec and other jurisdictions, did not exclusively pursue formal originality.<sup>118</sup> The Argentine codifier was well acquainted with Roman law and Castilian legislation. The archaic nature of those texts encouraged him to look for direct and modern

108 COBAS/ZAGO (1991) 146–147.

109 RIVAROLA (1901) 12.

110 COBAS/ZAGO (1991) 148.

111 VELEZ SANSFIELD (1865) v. See also LEVAGGI (2005) 204 and 310.

112 GUZMÁN BRITO (2000) 453.

113 PARISE (2010b) 40. See also SALVAT (1913) 436.

114 LEVAGGI (2005) 180.

115 *Id.*

116 SALVAT (1950) 132.

117 NAVARRO-VIOLA (1854) 3.

118 LEVAGGI (1992) 262.

models that would reproduce those ideas: the project of a civil code by Teixeira de Freitas for Brazil, the *Code Napoléon*, the *Concordancias, Motivos y Comentarios del Código Civil Español*<sup>119</sup> by García Goyena, the civil code of Chile by Andrés Bello,<sup>120</sup> and the Louisiana Code. Vélez mentions in his code, amongst many other sources, the *Corpus Iuris Civilis*,<sup>121</sup> the *Siete Partidas*,<sup>122</sup> principles of Canon law,<sup>123</sup> the project of a civil code for the State of New York,<sup>124</sup> the codes of numerous jurisdictions (*e.g.*, Austria,<sup>125</sup> Haiti<sup>126</sup>), and many doctrinal works (*e.g.*, William Blackstone,<sup>127</sup> Jean Domat,<sup>128</sup> James Kent,<sup>129</sup> Robert Joseph Pothier,<sup>130</sup> Friedrich Carl von Savigny<sup>131</sup>). Even when French authors and the codes that followed the *Code Napoléon* prevail in his notes, Vélez did not limit to follow one stream of thought, and his very diverse sources helped him elaborate an eclectic code.

### III. The Men behind the Mirrors

*Libraries* of civil codes aimed to reflect the normative transfers that took place during the codification period. Two of those resulting mirrors were designed by Charles-Chamilly de Lorimier in Quebec and by Luis Vicente Varela in Argentina. The two jurists lived in opposite ends of the Americas, most probably never interacted, and yet undertook a similar endeavor. Both designers were from the same generation, were born from political immigrants in exile, extended their interests beyond private law and civil code areas, and above all, were very prolific in their scholarly writings. The two designers also were at some point members of the superior courts of their jurisdictions. There is a significant difference between the designers, how-

119 GARCÍA GOYENA (1852).

120 ZORRAQUÍN BECÚ (1976) 350.

121 *E.g.*, note to article 2913 Argentine Code, in LEY 340 (1869) 773.

122 Note to article 455, *id.* at 546.

123 Note to article 14, *id.* at 507.

124 Note to article 2538, *id.* at 741.

125 Note to article 19, *id.* at 508.

126 Note to article 325, *id.* at 536.

127 Note to article 167, *id.* at 524.

128 Note to article 1198, *id.* at 625.

129 Note to article 3136, *id.* at 800.

130 Note to article 1650, *id.* at 663.

131 Note to article 3283, *id.* at 813.

ever. One was involved in ultramontanist and the other in freemasonry. These impacted politics and daily life during the nineteenth century across different parts of the Americas.

#### A. Lorimier<sup>132</sup>

Charles-Chamilly de Lorimier (September 13, 1842 to May 24, 1919) was born in the State of Iowa (USA).<sup>133</sup> He belonged to a generation that bridged two centuries during their adult and most prolific part of life. He was born while his parents entered exile after the defeat of the *Patriotes* at the battle of Saint-Eustache in 1837.<sup>134</sup> His family returned to Montreal soon after exile and his father, Jean-Baptiste, retook the practice of law.<sup>135</sup>

Lorimier would be identified throughout his life with nationalistic<sup>136</sup> and Catholic ideas in Quebec.<sup>137</sup> He studied law<sup>138</sup> at the Jesuit *Collège Sainte-Marie* where his conservative approach to life, law, and religion started to be shaped.<sup>139</sup> He was admitted to practice law in 1865,<sup>140</sup> one year before the Quebec Code took effect. He was involved with the Bar examination in Montreal and also taught criminal law at the Montreal location of *Université Laval*.<sup>141</sup> Lorimier was a member of the judiciary during the last years of his life, when invited to sit at the Quebec Superior Court from 1889 to 1914,<sup>142</sup> and where he rendered opinions both in French and English.<sup>143</sup> As part of his

132 A complete bibliography of Lorimier is available in the *Dictionary of Canadian Biography/ Dictionnaire biographique du Canada (DCB/DBC)* under the auspices of University of Toronto and Université Laval. See YOUNG, *Lorimier, Charles-Chamilly de*. See also NORMAND/ SAINT-HILAIRE (2002) 307–308.

133 YOUNG, *Lorimier, Charles-Chamilly de*.

134 *Id.*

135 His father was involved in a case that brought an action to rescind a deed of sale and transfer. The court, referring to that case, said: “it is painful to see a fellow-citizen accused of such a monstrous conduct.” *Lemoine v. Lionais*.

136 DICKINSON/ YOUNG (2002) 253.

137 YOUNG (1994) 16.

138 NORMAND/ SAINT-HILAIRE (2002) 307.

139 YOUNG, *Lorimier, Charles-Chamilly de*.

140 *Id.*

141 *Id.*

142 See the survey of Justices of the Superior Court of Quebec in the study by BOUTHILLIER (1977) 494.

143 CRÊTE (1993) 239. See, for example, the English decision in *Palliser v Vipond*.

conservative approach to law he tried to limit the impact that the Canadian Supreme Court had in Quebec.<sup>144</sup> His conservatism was also reflected in his religious views. Lorimier had joined and had been an advocate of ultramontanist.<sup>145</sup>

The designer of the *library* of the Quebec Code was a prolific author. In his time, both in Quebec and Argentina, historians, moralists, poets, and romantics belonged mainly to the judicial *world*.<sup>146</sup> His production includes, amongst others, the *library* in twenty-one volumes, a course book on criminal law,<sup>147</sup> and a text on property law.<sup>148</sup> He also participated with Canadian periodicals. For example, he wrote for the *Revue Canadienne* in the 1870s.<sup>149</sup> Lorimier was also a founding editor of *La Thémis*<sup>150</sup> in 1879, together with, amongst others, THOMAS Loranger and ÉDOUARD de Bellefeuille.<sup>151</sup> That journal, created by Eusèbe Senécal,<sup>152</sup> different from others in Canada at that time, also addressed social issues.<sup>153</sup> He contributed with that journal by writing on criminal law.<sup>154</sup> Lorimier also established with his sons in 1895 the *Revue de jurisprudence*,<sup>155</sup> once he had completed his *library* of the Quebec Code.<sup>156</sup> Those writings of Lorimier were accessible for the local legal community because periodicals in Quebec were published regularly<sup>157</sup> and were welcomed by libraries of Bar associations and courts.<sup>158</sup>

144 YOUNG, *Lorimier, Charles-Chamilly de*.

145 NORMAND / SAINT-HILAIRE (2002) 308.

146 VEILLEUX (1993) 122.

147 YOUNG, *Lorimier, Charles-Chamilly de*.

148 NORMAND / SAINT-HILAIRE (2002) 308.

149 NORMAND (1993b) 164.

150 *La Thémis: Revue de Législation, de Droit et de Jurisprudence*.

151 NORMAND (1993b) 182.

152 *Id.*

153 YOUNG, *Lorimier, Charles-Chamilly de*. The journal published its fifth and last volume in 1883. NORMAND (1993b) 182.

154 NORMAND / SAINT-HILAIRE (2002) 307.

155 *La Revue de Jurisprudence ou Recueil de Décisions des Divers Tribunaux de la Province de Québec*.

156 NORMAND (1993b) 182. That publication provided 48 volumes and outlived Lorimier, until 1942. He had transferred the journal to Whiteford and Theoret in 1895, however, soon after it was created. *Id.* at 182 and 175, n. 65.

157 MORIN (2000) 384.

158 NORMAND (1993b) 177.

## B. Varela<sup>159</sup>

Luis Vicente Varela (May 27, 1845 to December 12, 1911) was born in Montevideo (Uruguay),<sup>160</sup> while his parents entered exile during the government of Juan Manuel de Rosas.<sup>161</sup> He returned with his family to Buenos Aires soon after the battle of Caseros in 1852.<sup>162</sup> His father, Florencio, was a lawyer and politician that occupied a prominent role in Argentine history.<sup>163</sup> Florencio was murdered in Montevideo before the family returned to Argentina,<sup>164</sup> and left his family in a precarious financial situation.<sup>165</sup> Luis Varela kept a life-long connection with Vélez. He found in the Argentine codifier mentorship, worked in his law office,<sup>166</sup> and even published in 1871 one of his works on Public Ecclesiastical law.<sup>167</sup> Varela was also appointed secretary to Vélez while the latter was Minister of the Interior.<sup>168</sup> Vélez had been on good terms with Varela's father too, visiting his home before being exiled to Uruguay.<sup>169</sup>

Luis Varela always had an active public life. He was a freemason, being initiated into a lodge in 1868.<sup>170</sup> That same year he completed his law studies at the *Universidad Nacional de Córdoba*.<sup>171</sup> Varela occupied several public offices. He was president of the Supreme Court of the Province of Buenos Aires from 1887 to 1889,<sup>172</sup> and moved to the highest court of the country in 1889,<sup>173</sup> staying in office for ten years.<sup>174</sup> He is remembered for his dissenting vote in *Cullen v. Llerena*.<sup>175</sup> The majority of the court then

159 A complete bibliography is available in CUTOLO (1985) 502–503.

160 *Id.*

161 *Id.*

162 *Id.*

163 About Florencio Varela see, *id.* at 492–496.

164 *Id.* at 496.

165 BERCAITZ (1945) 5.

166 CUTOLO (1985) 503.

167 LEVAGGI (1969) 84–85.

168 CUTOLO (1985) 503.

169 CHÁNETON (1937) Vol. 1 p. 161.

170 LAPPAS (1966) 389.

171 TANZI (2005) 95 and CUTOLO (1985) 503.

172 TANZI (2005) 95.

173 ZAVALÍA (1920) 267–268.

174 HUERTAS (2001) 167.

175 *Cullen, Joaquín M. c. Llerena, Baldomero* (dealing with a decision of the Argentine President to intervene in the Province of Santa Fe). See also MILLER (2003) 879.

used the US decisions in *Georgia v. Stanton*<sup>176</sup> and *Luther v. Borden*<sup>177</sup> to solve the applicability of the political question doctrine.<sup>178</sup> Varela claimed, however, that the doctrine did not apply to a provincial government.<sup>179</sup> He later resigned to the Argentine Supreme Court due to a scandal related to debts with banks that could have led to impeachment.<sup>180</sup>

His legal knowledge exceeded private law. Varela explored the developing area of comparative law and looked into normative transfers.<sup>181</sup> He was also well read in constitutional and criminal law.<sup>182</sup> He claimed that the US historical background could apply to Argentina.<sup>183</sup> While in office with the Argentine highest court, he tended towards the imitation of the US constitutional law model, even using terms in English in his opinions.<sup>184</sup> Varela would refer to *The Federalist Papers*<sup>185</sup> and to US Supreme Court decisions,<sup>186</sup> especially those subscribed by Roger B. Taney and Salmon P. Chase.<sup>187</sup> Varela was also involved in law-making. He was House Representative for the Province of Buenos Aires,<sup>188</sup> and participated of the constitutional conventions for that province.<sup>189</sup> Varela additionally projected laws and codes. He helped shape the municipal laws of Buenos Aires,<sup>190</sup> and was appointed to oversee a reform for the provincial Constitution.<sup>191</sup> In addition, Varela

176 *Georgia v. Stanton*.

177 *Luther v. Borden*.

178 MILLER (2003) 880.

179 *Id.* at 879–880. For a complete study on the use and abuse of US sources by Varela when elaborating his dissent in *Cullen* see MILLER (1997) 283–299.

180 TANZI (2005) 95. See the detailed explanation of the scandal in MILLER (1997) 316–317. See also COLAUTTI (1991).

181 For example, Varela found comparative studies useful for the development of the public sector in Argentina, and addressed in his work Belgium, Hungary, Spain, Switzerland, the UK, and the US. Varela (1883).

182 CUTOLO (1985) 503.

183 HUERTAS (2001) 400.

184 *Id.* at 391–392.

185 *Id.* at 438.

186 *Id.* at 301.

187 *Id.* at 382.

188 CUTOLO (1985) 503.

189 *I.e.*, 1870–1873 and 1882–1889. CORTABARRÍA (1992a) 34–35 and 75, and CORTABARRÍA (1992b) 108 and 117.

190 CORTABARRÍA (1992a) at 75.

191 *Id.* at 75–76.

drafted the first American<sup>192</sup> Code of Administrative Law Litigation (*contencioso administrativo*),<sup>193</sup> which took effect in Buenos Aires in 1906.<sup>194</sup> His influential code, similarly to the one by Vélez, included notes<sup>195</sup> for the different articles.<sup>196</sup>

The designer of the Argentine *library* was a prolific author. He wrote at least 23 law related works,<sup>197</sup> and his history of the Argentine Constitution<sup>198</sup> motivated a law-review comment in the US, where he was deemed a “well known writer on both the public and private law.”<sup>199</sup> Similar to Lorimier, Varela contributed with periodicals. He wrote for the *Revista de Legislación y Jurisprudencia* of José María Moreno, Juan José Montes de Oca, and Antonio E. Malaver.<sup>200</sup> He also wrote for the *Revista de los Tribunales*,<sup>201</sup> which operated under the direction of Serafín Álvarez and Rafael Calzada.<sup>202</sup> Furthermore, Varela undertook the translation of English works into Spanish;<sup>203</sup> and was involved in journalism, working as editor for his family’s newspaper,<sup>204</sup> where he defended the codification work of

192 DÍAZ COUSELO (1994) 53.

193 In words of Varela, *contencioso adminturtaivo* includes those causes of action pursued before judicial courts against the public sector once administrative recourses are completed. See *Fiorito Hnos c. Dirección de Vialidad*.

194 See generally, BERCAITZ (1945) 6. Studies analyze the merits of the code: TAWIL (1989), HUTCHINSON (1983), and HUTCHINSON (1989). The code still applies in the province, even when a new code was enacted by Law 12,008 (1999). See CABRAL/MALJAR (2002). On the structure of the code see DÍAZ COUSELO (1994) 76–77.

195 In 2011, the note of Varela to article 29 of the code was cited by the Supreme Court of the Province of Buenos Aires. See *Estojacovich c. Instituto de Previsión Social s/pretenión anulatoria (R.I.L.)*.

196 BERCAITZ (1945) 7.

197 VARELA (1908) iv. See a complete list in CUTOLO (1985) 503.

198 VARELA (1908).

199 DODD (1911) 114.

200 It was initiated in 1869, and 12 volumes were published. CHÁNETON (1937) Vol. 2 p. 443, 445.

201 CUTOLO (1985) 503.

202 It operated from 1881 to 1883. CHÁNETON (1937) Vol. 2 p. 446–447, 449.

203 For example, in 1869, he translated a chapter of the work of John Norton Pomeroy entitled *An Introduction to the Constitutional Law of the United States*. See HUERTAS (2001) 173 and NADELMANN (1959) 212–213.

204 MUZZIO (1920) 420.

Vélez.<sup>205</sup> He did not limit his writings to law,<sup>206</sup> initiating the crime fiction genre in *Río de la Plata*.<sup>207</sup>

#### IV. Libraries of Civil Codes

The *libraries* of civil codes resulted from the efforts of two unique jurists. In the early 1870s, Lorimier and Varela started to envision multi-volume works on the formal sources of the civil codes of their jurisdictions. The purpose, content, structure, and audience of both works were similar. Lorimier and Varela, however, lived approximately 5,700 miles apart, in the far ends of the Americas. There is no indication that either of them had visited their respective countries, nor that they held epistolary contact. Furthermore, there is no indication that their works reached the opposite ends of the Americas during the 1870s.<sup>208</sup>

*Libraries* reproduced the formal sources that drafters of civil codes used. Lorimier provided transcriptions of the exact formal sources mentioned by the Commissioners in their Reports. Varela acted in a similar fashion for Argentina, including the formal sources that Vélez had mentioned in his notes to the Argentine Code. Lorimier was able to complete his work throughout 21 volumes, covering almost all the content of the Quebec Code. The work of Varela, in 16 volumes, was interrupted and covered only one fourth of the Argentine Code. Very few antecedents of the *libraries* can be found. For example, in France immediately after the enactment of the *Code Napoléon*, Julien-Michel Dufour aimed to indicate the sources of the

205 TAU ANZOÁTEGUI (1977b) 336.

206 He wrote plays and dramas. CUTOLO (1985) 503 and MUZZIO (1920) 420.

207 LAGMANOVICH (2001) 35–37 and CORTABARRÍA (1992b) 127.

208 The author of this paper found no indication that the personal papers of Varela and Lorimier have been preserved. He acknowledges that copies of the *libraries* or mere knowledge of their existence may have reached the far ends of the continent in the 1870s, though his research did not reflect those results. There is proof, however, that the work of Lorimier was already in the stacks of the main law library of Buenos Aires in the 1940s. The library of the Universidad de Buenos Aires held a copy at that time, though the records do not indicate the exact date of entry. The call and registration numbers show that the entry took place during the last decades of the nineteenth century. Further studies of the incomplete catalogue could indicate more conclusive results.

dispositions of that code,<sup>209</sup> though his work was less ambitious, and was limited to providing references<sup>210</sup> and not exclusively transcriptions.<sup>211</sup>

Comparative legislation started to gain momentum around the 1850s.<sup>212</sup> This activity predated the study of comparative law and provided comparisons between the different legislative bodies of different jurisdictions. The *libraries* benefited from this context and used those works as repositories for many formal sources. The leading works in comparative legislation for the Americas were by French and Spanish authors. Fortuné Anthoine de Saint-Joseph produced a work of legislative concordances that circulated in Argentina and Quebec at that time. The French author included in his work a synoptic chart that helped compare the texts of the *Code Napoléon* with the texts of several nineteenth century codes.<sup>213</sup> In Spain, Florencio García Goyena directed readers through the text of a Spanish civil code project of 1851 which included a scholarly analysis for each of its articles.<sup>214</sup> Drafters of civil codes in the Americas regarded those works as comparative-legislation tools. Another work that provided formal sources was completed at that time by Juan Antonio Seoane, also in Spain.<sup>215</sup> He provided translations and transcriptions of sources<sup>216</sup> that aimed to complete the *lacunae* that had existed in Spain,<sup>217</sup> and in the Americas, regarding comparative legislation.

#### A. Bibliothèque du Code Civil<sup>218</sup>

The Quebec Code provided the legal profession with an indispensable *vademecum* of private law for that part of Canada.<sup>219</sup> It had been noted, as

209 DUFOUR (1806) 4. See also the reference to the work of Dufour in BATIZA (1982) 478.

210 See, for example, the reference to articles 5 and 14 of Section 2 of the law of September 20, 1792, which is not followed by a transcription. DUFOUR (1806) 153.

211 See for example the transcription of article 30 of the declaration of April 9, 1736. *Id.* at 48 and 49.

212 TAU ANZOÁTEGUI (1977c) 79.

213 SAINT-JOSEPH (1840).

214 GARCÍA GOYENA (1852).

215 Seoane (1861).

216 *Id.* at 754.

217 *Id.* at vii.

218 See generally the complete study by Normand & Saint-Hilaire, which has been of constant reference for the author of this paper (NORMAND / SAINT-HILAIRE [2002]).

219 BELLEFEUILLE (1866) iv.

early as 1832, that in Quebec the law was spread throughout many volumes.<sup>220</sup> In addition, the texts by commentators of the *ancien* French civil law were starting to be scarce, being difficult to obtain copies of their works, together with a shortage of new editions and translations of significant legislative materials.<sup>221</sup> Local libraries had incomplete holdings of the *ancien* civil law materials that had been transferred into the Quebec Code,<sup>222</sup> and the importation of books turned out to be an essential way to complete existing collections.<sup>223</sup> In addition, law books in the 1870s were expensive in the region and complete libraries were limited to the wealthy,<sup>224</sup> or to courts<sup>225</sup> and Bar associations.<sup>226</sup> Lorimier aimed to illustrate with his *library* the formal sources that comprised that *vademecum*,<sup>227</sup> and therefore meet the needs of many practitioners trying to access those materials.<sup>228</sup>

The *library* of Lormier was entitled *Bibliothèque du Code Civil de la province de Québec*.<sup>229</sup> It was published in 21 volumes from 1871 to 1890,<sup>230</sup> spanning 16,500 pages, and was one of the earliest editions of the Quebec Code.<sup>231</sup> The first volume of the *library* demanded “18 months of research and study,”<sup>232</sup> and, together with two following volumes, was also signed by Charles Albert Vilbon.<sup>233</sup> The co-author of those first three volumes<sup>234</sup> was

220 DES RIVIÈRES BEAUBIEN (1832).

221 BRIERLEY (1968) 539.

222 BELLEFEUILLE (1871) 876.

223 NORMAND (1993a) 141.

224 BELLEFEUILLE (1871) 876. See also NORMAND/SAINT-HILAIRE (2002) 316.

225 For example, in the 1890s, the library of the Supreme Court of Canada seemed to be well furnished with works on the laws of France and Quebec. MORIN (2000) 349.

226 GALLICHAN (1993) 141–142.

227 Other contemporary editions of the Quebec Code (*e. g.*, Bellefeuille, Sharp) also addressed sources, though did not transcribe them. See HOWES (1989a) 112. See also *infra* V.A.

228 MORIN (2000) 278. Some catalogues and collections testify that practitioners acquired foreign doctrinal works. NORMAND (1993b) 166.

229 LORIMIER/VILBON (1871–1890).

230 Volumes and years of publication were: 1, 1871; 2, 1873; 3, 1874; 4, 1879; 5, 1880; 6, 1881; 7, 1882; 8, 1883; 9, 1883; 10, 1884; 11, 1885; 12, 1885; 13, 1885; 14, 1885; 15, 1886; 16, 1886; 17, 1888; 18, 1889; 19, 1889; 20, 1890; and 21, 1890.

231 KASIRER (2005) 507–508.

232 LORIMIER/VILBON (1871–1890) Vol. 1 p. 15. See also HOWES (1989a) 112.

233 LORIMIER/VILBON (1871–1890) Vol. 1–3 at cover page.

234 A breakdown of authorship of contributions for the first volume indicates that, even when the volume was signed by both authors, Lorimier played a leading role in the drafting of the different sections. See LORIMIER/VILBON (1871–1890) Vol. 1 p. 1–2.

admitted to practice law two years before Lorimier, and there are no indications that he contributed to other law-related publications.<sup>235</sup> The publication of the Quebec *library* was undertaken in Montreal by three different publishers; Eusèbe Senécal (founder of *La Thémis*) was responsible for ten volumes, while *La Minerve* and *Cadieux & Derome* were responsible for three and eight volumes, respectively.<sup>236</sup> Lorimier worked with the holdings of the library of the Bar of Montreal<sup>237</sup> and with those of his friends.<sup>238</sup> The Quebec Code was seen at that time as a “kind of library”<sup>239</sup> itself, and Lorimier therefore provided excerpts of its formal sources. In the words of Lorimier, his work aimed to complete “a small library of our Civil Code” (*petite bibliothèque de notre Code Civil*),<sup>240</sup> and accordingly, enable a natural prolongation of it.<sup>241</sup>

The *library* was a work of comparative legislation that reflected the normative transfers that had taken place in Quebec. It linked the law of that part of Canada with the remaining legal universe.<sup>242</sup> Lorimier indicated in the introduction to his *library* that “it is our objective to offer for each article the commentaries, developments, and comparative legislation, that a judicious election permits us to transcribe.”<sup>243</sup> His main contribution was the fidelity of the formal sources transcribed<sup>244</sup> (e. g., English, French, Roman, US).<sup>245</sup> Lorimier defended the notion that modern authors were a reflection of *ancien* writers, and that it was impossible to understand the provisions of the Quebec Code if there was ignorance on the origins of those *ancien* institutions.<sup>246</sup> He therefore saw the new text as a summarized and organized way of presenting the *ancien* laws.<sup>247</sup> He believed that the European and

235 NORMAND / SAINT-HILAIRE (2002) 308.

236 See generally LORIMIER / VILBON (1871–1890).

237 LORIMIER / VILBON (1871–1890) Vol. 1 p. 14.

238 NORMAND / SAINT-HILAIRE (2002) 324.

239 HOWES (1989b) 140.

240 LORIMIER / VILBON (1871–1890) Vol. 1 p. 13. See also NORMAND / SAINT-HILAIRE (2002) 313.

241 NORMAND / SAINT-HILAIRE (2002) 311.

242 HOWES (1989b) 142.

243 LORIMIER / VILBON (1871–1890) Vol. 1 p. 11.

244 *Id.* at 12. See also NORMAND / SAINT-HILAIRE (2002) 316.

245 LORIMIER / VILBON (1871–1890) Vol. 1 p. 13. See also HOWES (1989a) 112.

246 NORMAND / SAINT-HILAIRE (2002) 312–313.

247 LORIMIER / VILBON (1871–1890) Vol. 1 p. 5. See also NORMAND / SAINT-HILAIRE (2002) 313.

American formal sources he provided should be considered primary sources for modern laws.<sup>248</sup>

The work of Lorimier followed the structure of the Quebec Code. Articles, both in French and English, were followed by transcriptions of the Commissioner's Reports and of formal sources that naturally prolonged the given framework.<sup>249</sup> Lorimier did not correct, however, the contradictions<sup>250</sup> or mistakes made by the Commissioners, leaving that task to readers.<sup>251</sup> The *library* was interrupted at the end of Book III of the Quebec Code;<sup>252</sup> excluding the book on commercial law and the final dispositions.<sup>253</sup>

An approximation to the content of the *library* is reflected in the wording of its complete title.<sup>254</sup> Firstly, the work aimed to reproduce the text of the Quebec Code, both in French and English.<sup>255</sup> Secondly, it aimed to transcribe the Commissioner's Reports. Thirdly, the title indicated that it would include transcriptions of authorities to which the Commissioners referred, "together with many other authorities."<sup>256</sup> Transcriptions were provided in their original languages<sup>257</sup> (*i.e.*, English, French, Latin), though some Latin passages were provided in French with the assistance of existing translations.<sup>258</sup> Lorimier followed the original texts and ignored additions included in critical editions.<sup>259</sup> Yet, the normative transfer was not only

248 LORIMIER/VILBON (1871–1890) Vol. 1 p. 5. NORMAND/SAINT-HILAIRE (2002) 313.

249 See generally LORIMIER/VILBON (1871–1890) Vol. 1 and NORMAND/SAINT-HILAIRE (2002) 320–325.

250 HOWES (1989b) 139.

251 HOWES (1989a) 112.

252 LORIMIER/VILBON (1871–1890) Vol. 21.

253 See also NORMAND/SAINT-HILAIRE (2002) 324.

254 Complete title: "La bibliothèque du code civil de la province de Québec (ci-devant Bas-Canada): ou Recueil comprenant entre autre matières: 1. Le Texte du Code en Français et en Anglais. 2. Les rapports officiels de MM. les Commissaires chargés de la codification. 3. La citation au long des autorités auxquelles réfèrent ces Messieurs, à l'appui des diverses parties du Code [*Civil*, added since the second volume], ainsi que d'un grand nombre d'autres autorités. 4. Des tables de concordance entre le Code Civil du Bas-Canada et ceux de la France et de la Louisiane."

255 See, for example, the transcription of article 242, *infra* VII.A at 527.

256 LORIMIER/VILBON (1871–1890) Vol. 1 at cover page.

257 See, for example, the texts in French and Latin, *infra* VII.A at 527–528.

258 NORMAND/SAINT-HILAIRE (2002) 323.

259 *Id.* Some scholarly works and court decisions seem to have ignored the fact that Lorimier limited his work to transcriptions (*Id.* at 332–333). For example, even in 2009, Lorimier

reflected in the transcription of European formal sources because the *library* included, for example, numerous references to the Louisiana Code.<sup>260</sup> Fourthly, it aimed to provide tables of concordances between the Quebec Code, the *Code Napoléon*, and the Louisiana Code. This last objective was not achieved by the *library*,<sup>261</sup> though some studies incorrectly indicate the contrary.<sup>262</sup> Tables were no rarity at the time comparative legislation developed. They existed in Quebec, and to a similar extent, in other code-related works.<sup>263</sup> The title of the *library* did not reflect its content completely, however. For example, the introduction to the *opus* included valuable reflections on codification. Written in the context of the nineteenth century codification movements, they provided a panorama of codification endeavors in the Americas.<sup>264</sup>

The use that local scholars, practitioners, and courts made of the *library* helps illustrate its reception and effects. The *library* was deemed very useful for the practice of law because practitioners could easily cite authorities in their petitions, as did judges in their decisions.<sup>265</sup> Accordingly, the *library* simplified the practice of law in Quebec.<sup>266</sup> In addition, its portable size, conveniently divided into many volumes, made it easy to transport.<sup>267</sup> Judges in Quebec had easy access to copies of the *library* because soon after the work was completed, the government bought 100 copies to make them available to magistrates.<sup>268</sup> This also may have provided financial support to the enterprise of Lorimier. The book was also promoted by means of catalogues and, towards the beginning of the twentieth century, was seen as a work of erudition.<sup>269</sup> For example, a catalogue for the *Exposition Universelle* of 1900

was credited with the authorship of a passage that he had transcribed and acknowledged to Pothier (PARENT [2009] 262).

260 See, for example, the reference to article 233 of the Louisiana Code, *infra* VII.A at 534. RICHERT / RICHERT (1973) 503. The Louisiana Code occupied for Quebec a prominent role as formal and linguistic source, rather than as substantive model. *Id.* at 518.

261 The author of this paper was not able to identify the tables in the hard copies and microfilms he consulted. See also NORMAND / SAINT-HILAIRE (2002) 323.

262 FABRE-SURVEYER (1939) 658–659 and TASCHEREAU (1955) 120.

263 MCCORD (1870) 466–475.

264 LORIMIER / VILBON (1871–1890) Vol. 1 p. 3–15.

265 NORMAND / SAINT-HILAIRE (2002) 325–326.

266 *Id.* at 334.

267 The printing was presented in 16cm × 23.5cm, in 8 (*id.* at 327).

268 *Id.* at 329.

269 *Id.* at 331.

included the *library*, being one of the most expensive books for the Canadian section.<sup>270</sup> Lorimier's work was a tool for the identification of useful authorities when interpreting articles of the Quebec Code.<sup>271</sup> It was cited in scholarly writings,<sup>272</sup> court decisions,<sup>273</sup> and bibliographies<sup>274</sup> throughout that same century in Canada. For example, a case decided in 1977 by the Supreme Court of Canada read: "The fourth Report [...] gives a list of the authorities on which they relied, and I can do no better than refer to the relevant texts compiled in de Lorimier."<sup>275</sup> The *library* was cited in other jurisdictions, even deserving a reference in the seminal work by Marcel Planiol.<sup>276</sup> Its impact was anticipated as early as 1871, when it was said that the *library* should be in libraries of "all advocates, notaries, priests, and all educated men that love being aware of the laws that govern their actions."<sup>277</sup>

## B. Biblioteca del Código Civil

The Argentine Code overruled existing prior laws. Its notes, however, attracted an array of European materials that had predated it and that had been

270 *I. e.*, World Fair of Paris. GRANGER/GRANGER (1900) 54.

271 NORMAND/SAINT-HILAIRE (2002) 331.

272 For example, the *library* was very much cited in the proceedings of the 1934 *Journées du droit civil français* that took place in Montreal and included contributions from some of the main scholars of that time (Le droit civil français: Livre-souvenir des Journées du droit civil français [1936]). In the 1980s, a book review mentioned that the *library* was a tool for better understanding a critical edition of the code by Paul-A. Crépeau (RUDDEN [1982] 871). Other examples of references to the *library* are found in the 1950s (PAQUET [1959] 85), in the 1960s (COMTOIS [1964] 38–41), in the 1970s (JACOBY [1970] 87–88), and in the 1990s (LARUE [1993] 25).

273 See, for example, the references to the work of Loirmier in *The Township of Ascot v. The County of Compton – The Village of Lennoxville v. the County of Compton*; *Pagnuelo v. Choquette*; *City of Montreal v. Cantin*; *Masson v. Masson*; *Duchaine v. Matamajaw Salmon Club*; *Joseph Pesant v. Charles Robin*; *The Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*; *Guaranty Trust Co. of New York v. The King*; *Barman v. Villard*; *Tremblay v. Daigle*; *Rocois construction inc. v. Québec ready mix inc.*; and *Première Nation Malécite de Viger (Conseil) v. Crevette du Nord Atlantique inc.* Several examples are also provided by NORMAND/SAINT-HILAIRE (2002) 332.

274 For example, in the 1970s, the *library* was cited in bibliographies on Canadian civil law, both in Canada and the US. See BOULT (1977) 309 and BOULTBEE (1972) 27.

275 *Cargill Grain Co. v. Foundation Co. of Canada Ltd.*

276 PLANIOL/RIPERT (1932) 60.

277 BELLEFEUILLE (1871) 876.

transferred to the Americas by the codifier. Vélez wrote in 1868 that he had aimed to show in his code the “current status of [legal] science, and had therefore grounded the resolutions made in the code with the writings of the best known jurists from all nations.”<sup>278</sup> Practitioners, scholars, and courts welcomed European literature that arrived at the time the Argentine Code was adopted. They sought to hold copies of the works cited in the notes of Vélez,<sup>279</sup> though privately-owned law libraries rarely had complete collections.<sup>280</sup> Such collections required at least 600 expensive volumes, and while some were able to furnish them, others found in the *library* of Varela an affordable option.<sup>281</sup> In addition, some local courts applied historical interpretations of code provisions. When interpreting, they looked into Castilian, *Indiano*, and National law. For example, the already mentioned Juan José Montes de Oca<sup>282</sup> indicated in 1877 that jurists should know legal history.<sup>283</sup> Antonio E. Malaver, who was also involved with the *Revista de Legislación y Jurisprudencia*, looked at *ancien* laws while acting as the Argentine Attorney General.<sup>284</sup> He understood that complete derogation was no obstacle for referral to prior laws.<sup>285</sup> It was also useful to cite, for example, the work of García Goyena<sup>286</sup> because, as mentioned in 1887, the latter *owned* the *ancien* laws that had been common to Argentina and that led the way for the new legislation.<sup>287</sup> Scholars would soon comment on the merits and sources of the Argentine Code.

The *library* of Varela was entitled *Concordancias y Fundamentos del Código Civil Argentino*.<sup>288</sup> It was published in 16 volumes from 1873 to 1875,<sup>289</sup> spanning 6,400 pages, and was deemed the first important work on the new

278 CABRAL TEXO (1920b) 242.

279 CHÁNETON (1937) Vol. 2 p. 372.

280 CASTÁN VÁZQUEZ (2000) 523.

281 CHÁNETON (1937) Vol. 2 372–373.

282 See *supra* note 200 and accompanying text.

283 LEVAGGI (1979) 108.

284 *Id.*

285 *Id.*

286 See *supra* note 214 and accompanying text.

287 LEVAGGI (1979) 109.

288 VARELA (1873–1875).

289 Volumes and years of publication were: 1, 1873; 2, 1873; 3, 1874; 4, 1874; 5, 1874; 6, 1874; 7, 1874; 8, 1874; 9, 1874; 10, 1875; 11, 1875; 12, 1875; 13, 1875; 14, 1875; 15, 1875; and 16, 1875.

private law of Argentina.<sup>290</sup> The publication of the Argentine *library* was undertaken in Buenos Aires by *H. y M. Varela*,<sup>291</sup> the publishing house of Varela's brothers. Varela worked with materials provided by Vélez, most probably from the codifier's private library. Varela said in the introduction to his *library* that "Vélez provided me with some books that are difficult to find even in Europe."<sup>292</sup> Two other facts indicate the participation of Vélez in the *library*. Varela cited in his work Castilian formal sources that only appear in the draft of Vélez.<sup>293</sup> Those references to Castilian sources seem to indicate mentorship provided by the codifier. In addition, the work of Varela was interrupted in 1875, the year Vélez died.<sup>294</sup> The *library* aimed to turn unnecessary the access to the works mentioned in the code's notes and therefore reproduced the passages referred by Vélez.<sup>295</sup> In words of Varela, his *library* "should be called the library of the Argentine Code" (*debiera llamarse la Biblioteca del Código Civil Argentino*).<sup>296</sup>

The Argentine *library* was a work of comparative legislation. It reflected the normative transfers that had taken place in that part of the Americas by reproducing texts cited by Vélez in his notes. Varela claimed that the notes were the official commentary to the code and that they reflected the latest developments of legal science.<sup>297</sup> Identification of transfers could resemble the reconstruction of a tapestry from a canvas: similar solutions could be provided by different sources.<sup>298</sup> The content of the notes, as reproduced by Varela, could offer guidance in that reconstruction process.<sup>299</sup> Vélez had gone through thousands of pages, while selecting and classifying by means of critical analysis;<sup>300</sup> and the *library* mirrored the results of that process. Vélez stated in 1865 that,

290 MORENO (1873) xi.

291 VARELA (1873–1875) Vol. 1 at cover page.

292 *Id.* at 17.

293 CHÁNETON (1937) Vol. 2 p. 375.

294 SALERNO (1969) 316–317.

295 VARELA (1873–1875) Vol. 1 p. 17.

296 *Id.* and TAU ANZOÁTEGUI (1998) 542.

297 VARELA (1873–1875) Vol. 1 p. 9. See also SALERNO (1969) 316.

298 SALERNO (1992) 225.

299 In Argentina, studies of local formal sources waited until the 1920s. See CABRAL TEXO (1919) 18.

300 SALERNO (1992) 225.

I have considered all the codes published in Europe and America, and the comparative legislation of Mr. Seoane. I have used mainly the Spanish Project of Mr. Goyena, the Code of Chile, that much surpasses the European codes and, mainly, the project of a civil code that Mr. Freitas is working on for Brazil, from which I have borrowed many articles.

Regarding the legal doctrines that I believed necessary to convert into laws for the First Book, my main guides have been the German jurists Savigny and Zacharie, the great work of Mr. Serrigny on administrative law of the Roman Empire, and the work of Story, Conflict of Laws.<sup>301</sup>

The *library* of Varela followed the structure of the Argentine Code.<sup>302</sup> The comments to the Argentine articles included transcriptions of European and American formal sources. Varela said in the introduction to his *library* that laws never resulted from capricious decisions or from improvisation.<sup>303</sup> He cited Joseph Story, and said in Spanish that “the preamble of a statute is a key to open the mind of the makers.”<sup>304</sup> Varela then stated that the preamble of the Argentine Code was no other than the study of the authorities included in its notes.<sup>305</sup> Accordingly, it was necessary to determine if the authorities cited had been actually considered by the codifier.<sup>306</sup> A comparative and well-reasoned study of the materials used by the codifier would open the mind of the maker.<sup>307</sup> In 1875, the *library* was interrupted in article 1260 of the Argentine Code,<sup>308</sup> having covered only one fourth of the code. In 1881, the work was continued by Serafín Álvarez<sup>309</sup> and Rafael Calzada, editors of the *Revista de los Tribunales*.<sup>310</sup> They continued publishing the *library*, reaching article 1843 of the Argentine Code,<sup>311</sup> though with a slightly different plan.<sup>312</sup> Varela was not involved with that new publication and the work also addressed the main decisions of the supreme courts of Argentina and Buenos Aires.<sup>313</sup>

301 VELEZ SARSFIELD (1865) v.

302 VARELA (1873–1875) Vol. 1 p. 19.

303 *Id.* at 2.

304 *Id.* at 1. Varela was referring to STORY (1833) § 218, 163.

305 VARELA (1873–1875) Vol. 1 p. 1.

306 *Id.* at 8.

307 *Id.*

308 VARELA (1873–1875) Vol. 16 p. 365–382. See also TAU ANZOÁTEGUI (1998) 542.

309 HAYES (2008) 84.

310 CHÁNETON (1937) Vol. 2 p. 375–376.

311 CALZADA/ÁLVAREZ (1881).

312 CHÁNETON (1937) Vol. 2 p. 449.

313 *Id.* at 375–376.

The *library* consisted of mainly four building blocks. Firstly, it included the transcription of articles of the Argentine Code.<sup>314</sup> This followed the numbering given by Vélez in his draft. Each title, therefore, restarted the numbering of articles. Secondly, it included the transcription of references made by Vélez in his notes, though not always extracted from the same editions used by the codifier.<sup>315</sup> The transcriptions were translated into Spanish.<sup>316</sup> Texts originally in English, French, Italian, Latin, and Portuguese would be then easily accessible for Spanish readers.<sup>317</sup> Thirdly, it reproduced *verbatim* transcriptions of foreign materials that Varela understood as relating to Argentine articles, even when Vélez had omitted references to them in the notes.<sup>318</sup> For example, even when Vélez had been silent,<sup>319</sup> Varela indicated that articles 424 and 430 of the Louisiana Code had been sources for article 37 of the Argentine Code.<sup>320</sup> Fourthly, the volumes were enriched by two indexes. One followed the structure of the Argentine Code;<sup>321</sup> while the other classified alphabetically the legislation and authors cited according to the areas they addressed.<sup>322</sup> Accordingly, the *library* consisted of transcriptions and translations of materials that Vélez used in his drafting. Had it been completed, the *library* would have been an exhaustive *opus magnum*,<sup>323</sup> rendering further studies on the sources of the Argentine Code unnecessary.

Scholars, practitioners, and courts made use of the *library*. Varela had aimed to simplify the study and application of the Argentine Code,<sup>324</sup> making research less time consuming.<sup>325</sup> He deemed it unnecessary for practitioners to turn to the original books cited by Vélez because relevant

314 See, for example, the transcription of article III (*i.e.*, 266), *infra* VII.B at 201.

315 CHÁNETON (1937) Vol. 2 p. 376.

316 See, for example, the French and Italian texts in a Spanish translation, *infra* VII.B at 201.

317 VARELA (1873–1875) Vol. 1 p. 20.

318 *Id.* at 17–18. See, for example, the references also to the code of Sardinia, when Vélez only referred to the Castilian *Siete Partidas*, *infra* VII.B at 201.

319 Ley 340 (1869) 510.

320 VARELA (1873–1875) Vol. 2 p. 365–336. Varela said, “arts. 424 and 430 of the Louisiana Code, even when not cited by the Argentine codifier, support the text of article [37],” and he then provided a translation of the Louisiana texts. *Id.* at 37.

321 *Id.* at i–xiv.

322 *Id.* at xv–xxxii.

323 MARTÍNEZ PAZ (2000) 184.

324 VARELA (1873–1875) Vol. 1 p. 14.

325 *Id.* at 18.

parts were transcribed in his *opus*.<sup>326</sup> Even if transcriptions were only of passages of the claimed doctrines, research would very much benefit from an easy examination of formal sources.<sup>327</sup> The *library* was valued by contemporary scholars. For example, during a strong debate between two renowned commentators of the Argentine Code,<sup>328</sup> one of them acknowledged the significant contribution that Varela had achieved with his *library*.<sup>329</sup> Courts also welcomed the *library*, which could be useful when facing the interpretation method followed by the Argentine Supreme Court in some decisions. For example, in 1891, a decision stated that to understand the meaning of a provision the usual practice of the court was to move from Roman to Castilian law and from there to the Argentine Code.<sup>330</sup> The Argentine National Congress and the Buenos Aires Legislature passed laws in which they authorized the buying of 400 and 150 copies of the *library*, respectively.<sup>331</sup> These copies were aimed at courts, and provided financial support to the enterprise of Varela. The *library* was cited in court decisions,<sup>332</sup> even in the twenty-first century. For example, in 2002, an appeal court stated the usefulness of the *library* by referring to the ample indications and transcriptions it provided.<sup>333</sup>

## V. Looking at Mirrors of the Law

Nineteenth century codification spread through the Americas, reaching Quebec and Argentina. Accordingly, *libraries* developed and were applied within different social and legal contexts. There are significant differences amongst contexts, yet codification endeavors in the Americas reveal certain

326 *Id.* at 17.

327 Moreno (1873) x. That easy access also generated interpretation problems. Some practitioners cited in their petitions passages from those transcriptions, even when the references by the codifier were made to indicate decisions he had not adopted. LEVAGGI (1979) 102.

328 *I. e.*, José Olegario Machado and Baldomero Llerena.

329 MACHADO (1903) 37. Elaborations of full commentaries on the Argentine Code were very time consuming. José Olegario Machado said that from 1893 to 1902 all his energies had been devoted to the drafting of his commentary, a work that required 11 volumes (*Id.* at 1).

330 LEVAGGI (1985) 158.

331 VARELA (1873–1875) Vol. 3 p. 4–5.

332 See, for example, the references to the work of Varela in *Barlett, Esteban s/sucesión testamentaria*; *Christoffersen, Hans*; *Amoruso c. Casella*; *El Fénix c. Pérez de Sanjurjo*; *Guala c. Tebes s/daños y perjuicios*; and *Vázquez c. Bilbao*.

333 *A., A. S.B. c. Estado Nacional*.

similarities. The interest in formal sources, together with the development of positivistic approaches to law, was present in most American jurisdictions that experienced codification. These two aspects reflect – at least for the particular situations mentioned in this paper – a pan-American evolution that took place during the years that followed the enactment of civil codes.

#### A. European Formal Sources

Scholars in American jurisdictions traced formal sources of their civil codes. There was a pan-American interest in that treasure trove of European formal sources. On occasions, initially the drafters and those tracing formal sources soon after, welcomed the association to the prestige held by transferred elaborations in their jurisdictions of origin. The tracing of sources, however, was not pursued exclusively by means of *libraries* of civil codes. Many times, nineteenth century scholars worked on glossed editions of codes, in which formal sources were only pinpointed. Codifiers, like builders of monuments, benefited by using the best materials provided by the legal science of their time.<sup>334</sup> The annotation or glossing of codes helped identify those materials, and provided motives and resulting concordances. Some nineteenth century codifiers had already incorporated annotations to their drafts (*e.g.*, Argentina, Brazil, Chile, New York, and Uruguay).<sup>335</sup> On the Iberian Peninsula, Spain had provided the already mentioned work by García Goyena, which was considered a seminal glossed edition.<sup>336</sup> He said that each article of the Spanish project would include a reference to corresponding provisions of other legislative works (*concordancias*), motives (*motivos*), and commentaries (*comentarios*).<sup>337</sup> That way, he said, readers would have almost universal knowledge of the legislation on that topic with just a simple glance.<sup>338</sup> That trend to provide glossed editions of codes would soon spread throughout both sides of the Atlantic.

South American jurisdictions provided several examples of glossed editions of codes. In Argentina, Lisandro V. Segovia, Baldomero Llerena, and

334 RODRÍGUEZ (1938) 189.

335 ABÁSULO (2004) 423.

336 GARCÍA GOYENA (1852).

337 PARISE (2008) 841.

338 GARCÍA GOYENA (1852) Vol. 1 p. 9.

José Olegario Machado embarked upon that path.<sup>339</sup> Their focus, as that of other commentators, was for the most part initially on European sources, both legislative and doctrinal.<sup>340</sup> The Argentine Code provided an example of reception of foreign laws, which after adaptation were considered local.<sup>341</sup> In Chile, soon after 1856, the codifier, Andrés Bello, envisioned a glossed edition of his code with notes for each article. Though never completed, his projected edition was to be built on the notes that he had included in his 1853 draft.<sup>342</sup> Such a work would have been useful in Chile, where law was taught according to the letter and structure of the local code.<sup>343</sup> In Uruguay, codifiers were also expected to explore an array of legislation and doctrinal works while looking for material sources.<sup>344</sup> Their works were then more about selection than creation.<sup>345</sup> In the early twentieth century, Rafael Gallinal provided for Uruguay a glossed edition of the local civil code.<sup>346</sup> In Uruguay, though in 1851, Eduardo Acevedo, the drafter of a civil code project, also made an early approach to the distinction of formal and material sources that applies to many American codification endeavors. He stated that,

having used for our work writings by French authors [...] it will be questioned why we have not cited them, especially since on occasions we borrowed their words. However, that was necessary because we imposed ourselves to provide a national character to the work, removing all foreign scent that would be reproached. Furthermore, many times an article that had been triggered by reading [the French] Toullier found support on an opinion by [the Spaniard] Sala [...], which, although identical in substance, lacked the fundamentals that made it more acceptable.<sup>347</sup>

North American jurisdictions also provided examples of glossed editions of codes. In Quebec, for example, glossed editions were also welcomed soon after the code was adopted. Those glosses referred to sources, though they only listed them, while dealing mainly with the reporting of local deci-

339 TAU ANZOÁTEGUI (1977c) 113–114.

340 CABRAL TEXO (1919) 26.

341 ZORRAQUÍN BECÚ (1976) 350 and 359.

342 GUZMÁN BRITO (2005) 66.

343 See *Advertencia*, in LASTARRIA (1864).

344 PEIRANO FACIO (2008) 65.

345 *Id.* at 65.

346 GALLINAL (1911–1912).

347 ACEVEDO/PALOMEQUE (1908) 342. See also GUZMÁN BRITO (2000) 461–462 and MO-RÉTEAU/PARISE (2009) 1146.

sions.<sup>348</sup> Thomas McCord, one of the secretaries of the Codifying Commission, worked on an edition that included references to the authorities cited in the Reports together with tables of concordances with the *Code Napoléon* and the *Code de commerce*.<sup>349</sup> Those glosses included references for “notaries, clergymen, physicians, merchants, real estate owners, and persons out of Lower Canada.”<sup>350</sup> Examples of glossed editions were also provided by US states. Very early during the nineteenth century, in the State of Louisiana, some copies of the Digest of 1808<sup>351</sup> – the predecessor of the Louisiana Code – included manuscript glosses that related to its different titles and articles.<sup>352</sup> Later, the codifiers of the influential Louisiana Code drafted a project including glosses with references to many authorities.<sup>353</sup> In 1838, Wheelock Upton and Needler Jennings published a well circulated edition of the Louisiana Code with glosses.<sup>354</sup> They referred to related legislation,<sup>355</sup> doctrinal works,<sup>356</sup> and court decisions.<sup>357</sup> Their work would “fill a void in the libraries of the gentlemen of the Bar”<sup>358</sup> and “render unnecessary those laborious researches, the prosecution of which often require extended and thorough knowledge of the annals of jurisprudence.”<sup>359</sup> The State of New York also provided the Americas with glosses. David Dudley Field worked on a project of a civil code for that state.<sup>360</sup> His 1865 project had notes for two-thirds<sup>361</sup> of its articles,<sup>362</sup> and indicated references to, amongst

348 HOWES (1989b) 139.

349 MCCORD (1870) 466–475.

350 *Id.* at cover page.

351 An Act providing for the promulgation of the Digest of the Civil Laws now in force in the territory of Orleans (1808). The complete English title of the Digest: “A Digest of the Civil Laws Now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present System of Government.” Text available at Digest Online.

352 See the complete study by CAIRNS (2009).

353 See generally LIVINGSTON et al (1823).

354 UPTON/JENNINGS (1838).

355 See the reference to a Louisiana Act of 1828 in the note to article 263 (*id.* at 39).

356 See the reference to the work of Domat in the note to article 263 (*id.* at 39).

357 See the reference to the case *Proctor v. Richardson* in the note to article 301 (*id.* at 44).

358 *Id.* at iii.

359 *Id.*

360 The Civil Code of the State of New York: Reported Complete by the Commissioners of the Code (1865).

361 BATIZA (1986) 803.

362 The project referred to sections and not to articles.

others, related court decisions,<sup>363</sup> revised statutes,<sup>364</sup> the *Code Napoléon*,<sup>365</sup> and the Louisiana Code.<sup>366</sup> Even though the project was never the law of New York,<sup>367</sup> its drafts were influential,<sup>368</sup> and its provisions about the law of contracts were adopted by several states (*e.g.*, California, Montana).<sup>369</sup> Additionally, in the State of California, during the early 1870s, the local Code Commissioners provided in their work annotations that significantly replicated the glosses by Field.<sup>370</sup>

## B. Positivistic Studies

Positivistic approaches to the study and understanding of law gained popularity during the nineteenth century in Europe and the Americas.<sup>371</sup> Several schools of thought evolved from nineteenth century European positivism. Some of those, and their leading representatives, had a significant impact on the drafting of codes in the Americas. Examples of the latter are: Legal Positivism (*e.g.*, Jeremy Bentham); French Exegetical School (*e.g.*, Jean-Charles Demolombe); and German Historical School, which in part developed into Scientific Positivism (*e.g.*, Savigny), and ultimately into Conceptual Jurisprudence (*e.g.*, Bernhard Windscheid).<sup>372</sup> The impact of positivism in the Americas was felt especially during the last decades of the nineteenth century.<sup>373</sup>

The French Exegetical School occupied a paramount position in the codification projects in the Americas. In France, soon after the adoption of

363 For example, the note to article 443 of the project read, “Halsey v. Mc. Cormick, 18 N.Y., 147.” *The Civil Code of the State of New York: Reported Complete by the Commissioners of the Code* (1865) 135.

364 For example, the note to article 523 of the project read, “R.S., 758, § 12.” *Id.* at 156.

365 For example, the note to article 444 of the project read, “This and the four sections following are similar to those of the Code Napoleon, art. 559–563.” *Id.* at 135.

366 For example, the note to Chapter 2, Title 3, Part 4, Division 2 of the project read, “The provisions of this chapter, except § 455, are similar to those of the Code Napoleon and the Code of Louisiana.” *Id.* at 136. See also HERMAN (1996) 423.

367 FIELD (1898) 88.

368 Extracts from Notices of David Dudley FIELD (1894) 39.

369 HERMAN (1996) 425.

370 PARMA (1929) 19.

371 See generally BOBBIO (1996).

372 LEVAGGI (2005) 219, DÍAZ COUSELO (2003) 371, and TAU ANZOÁTEGUI (1977c) 105.

373 TAU ANZOÁTEGUI (1977a) 423.

the *Code Napoléon*, scholars and judges interpreted code provisions by closely following their language (literal meaning)<sup>374</sup> and in light of their preparatory works (e. g., Pothier, Domat).<sup>375</sup> Their interpretations were published as commentaries to the different articles.<sup>376</sup> The exegesis was both a way of presenting and of teaching law,<sup>377</sup> and Demolombe, regarded as the *prince of exegesis*, advocated, as did other representatives, the supremacy of written codified law.<sup>378</sup> Accordingly, articles would be stated individually, with no references to philosophical or historical argumentation.<sup>379</sup> Examining history was done, however, when support for a certain interpretation was required or when reconstructing the “pedigree” of a provision.<sup>380</sup> The Exegetical School followed the *Code Napoléon* and its representatives were read together with the code,<sup>381</sup> even motivating translations into vernacular languages.<sup>382</sup> Exegesis was therefore well received in the Americas,<sup>383</sup> even in Louisiana, where codifiers seemed to adhere to the school.<sup>384</sup> The reconstruction of “pedigree” in European authors took place too, when legislative productions required references to, for example, French, German, or Italian works.<sup>385</sup>

The exegetical approach limited the creativity of scholars and judges, however.<sup>386</sup> In France first, and later in the Americas, the exegetical approach was replaced by interpretations that responded more to social reality.<sup>387</sup> François Géný, in France, explored the legislation that had developed outside of the *Code Napoléon*, together with customs, court decisions, and social sciences.<sup>388</sup> His Free Scientific Research approach departed from the exegetical interpretation, and gave significant room for

374 SALERNO (1992) 228.

375 YIANNPOULOS (1977) 58.

376 *Id.*

377 PETIT (2001) 69.

378 LEVAGGI (1979) 29.

379 RAMOS NÚÑEZ (1997) 234.

380 *Id.* at 233.

381 DÍAZ COUSELO (2009) 17–18.

382 ARAGONESES (2009) 80.

383 LEVAGGI (1979) 30.

384 YIANNPOULOS (1977) 48.

385 RAMOS NÚÑEZ (1997) 235.

386 RAMOS NÚÑEZ (1996) 10.

387 RAMOS NÚÑEZ (1997) 233.

388 YIANNPOULOS (1977) 58–59.

other sources of law (*e.g.*, customs) that gained weight in civil law jurisdictions.<sup>389</sup> Another reaction came mainly from Germany, where the Historical School, and later Scientific Positivism, advocated customs and traditions and the objective interpretation of the law, respectively. Both German and French ideas would react against the supremacy of the letter of the law.<sup>390</sup> As the examples in Quebec and Argentina show, the Exegetical School prevailed however in law teaching, in scholarly works, and in court decisions<sup>391</sup> well into the twentieth century.

The Quebec Code did not immediately trigger exegetical approaches to the law. Shortly after 1866, scholarly writings qualified as mainly historical, philosophical, and non-professional;<sup>392</sup> while judges continued to elaborate decisions that did not resemble, in substance and technique, those made in France by the adherents of the Exegetical School.<sup>393</sup> Changes in Quebec took place at the turn of the century and extended until the 1960s.<sup>394</sup> In the early twentieth century, the Quebec Code became an untouchable icon.<sup>395</sup> Scholarship moved towards a more analytical and exegetical understanding of the code.<sup>396</sup> A central place was also occupied by the code in the teaching of law. Its structure welcomed expository and didactic teaching that emphasized its logic and internal coherence.<sup>397</sup> Courts were also interested in local interpretations of the Quebec Code, and looked for local identity by exploring diverse sources, mainly the French doctrine, and also the developing local doctrine, and the common law.<sup>398</sup> The continuity of *ancien* laws in Quebec invited historical interpretations, however.<sup>399</sup> German ideas had also traveled during the nineteenth century to that part of the Americas,<sup>400</sup> and there was an interest in establishing a civilian conception of sources and methods of interpretation that evolved into a scientific analysis of the text of

389 *Id.* at 48.

390 RAMOS NÚÑEZ (1997) 237.

391 *Id.*

392 MACDONALD (1985) 598. See also HOWES (1989b) 139.

393 BRIERLEY/MACDONALD (1993) 53.

394 MACDONALD (1985) 598, MORIN (2000) 381, and NORMAND (1982) 1014–1015.

395 BRIERLEY/MACDONALD (1993) 46.

396 MACDONALD (1985) 593 and 598. See also HOWES (1989b) 139 and JOBIN (1992) 388.

397 BRIERLEY/MACDONALD (1993) 63.

398 JOBIN (1992) 385–386.

399 BRIERLEY/MACDONALD (1993) 149 and ARROYO I AMAYUELAS (2003) 274.

400 REITER (2004) 447.

the code.<sup>401</sup> In 1907, Frederick Parker Walton<sup>402</sup> completed a work that responded to that scientific approach of inquiring into the meaning in literary sources, though also through history.<sup>403</sup> He provided 12 rules for interpreting the Quebec Code,<sup>404</sup> and three rules were of special relevance for the value of historical sources.<sup>405</sup> For example, Rule 11 ended by stating that an article “must be interpreted in the light of its history.”<sup>406</sup> He indicated that the Reports and the *library* were useful tools,<sup>407</sup> because “the interpretation of an article of the Code may sometimes require lengthy historical investigation.”<sup>408</sup>

The Argentine Code triggered exegetical approaches to the law. Positivist approaches, mainly those from the Exegetical School,<sup>409</sup> were present in the works of scholars and judges during the second half of the nineteenth century and extended, though at a slower pace, well into the next century.<sup>410</sup> These tried to identify the intention of the codifier,<sup>411</sup> and promoted the study of the letter of the law and its sources.<sup>412</sup> A *culture of the code* developed, and was reflected in scholarly writings and judicial interpretations that turned the code into a repository of legal science<sup>413</sup> with absolute value.<sup>414</sup> The code was also the central figure in law teaching, together with the work of exegetical scholars.<sup>415</sup> Teaching followed the structure of the code until 1910,<sup>416</sup> and articles were broken down and studied throughout

401 BRIERLEY/MACDONALD (1993) 142.

402 On the work of Walton see also BRIERLEY/MACDONALD (1993) 135–142. Walton made an early use of the term “transplantation of legal systems” (WALTON [1927] 189).

403 BRIERLEY/MACDONALD (1993) 142.

404 WALTON (1980) 85–129.

405 *I.e.*, rules 10, 11, and 12. *Id.* at 115, 116, and 118.

406 The complete text of Rule 11 read, “When the question is not concluded by reference to the decisions here, or, in appropriate cases, by reference to the French commentators, the article must be interpreted in the light of its history.” *Id.* at 116.

407 *Id.* at 116.

408 *Id.* at 118.

409 ESBORRAZ (2007) 34–35 and RAMOS NÚÑEZ (1997) 200.

410 SEOANE (1981) 68.

411 VERNENGO (1977) 77.

412 TAU ANZOÁTEGUI (2011) 72.

413 TAU ANZOÁTEGUI (2007) 19–20.

414 TAU ANZOÁTEGUI (1998) 543–544.

415 MARTÍNEZ PAZ (2000) 350, SALERNO (2004) 149, TAU ANZOÁTEGUI (1977c) 113, SALERNO (1993) 123, and TAU ANZOÁTEGUI (2007) 162.

416 SALERNO (1974) 205.

the years at law school.<sup>417</sup> The legislator's intention was sought in the notes,<sup>418</sup> which opened the way to studies on comparative legislation.<sup>419</sup> Other positivistic approaches, such as the ideas of Savigny<sup>420</sup> and Scientific Positivism,<sup>421</sup> were also welcomed and, though in cases language barriers needed to be bridged, they helped develop an eclectic legal thought.<sup>422</sup> The work of scholars was therefore eclectic, reflecting exegetical and scientific approaches.<sup>423</sup> The introduction of Moreno to the *library* also reflects an interest in Scientific Positivism.<sup>424</sup> He said in the introduction of that exegetical work that the "civil-legislation reform achieved by codification [in Argentina] had essentially created Scientific law."<sup>425</sup> The new century brought criticisms to extreme positivistic approaches, however.<sup>426</sup> Social sciences liberated law from the narrow exegetical approach, starting to open the way to more scientific approaches that advocated their inclusion in the study of law.<sup>427</sup> These approaches, reflected in, for example, the seminal work of Gény,<sup>428</sup> also placed the code in a paramount position, yet, when interpreting provisions, also used doctrine, court decisions, comparative legislation, customs, and other social elements.<sup>429</sup>

## VI. Closing Remarks

Codification in Europe and the Americas provided fertile ground for an exercise of comparative legal history. The exercise aimed to provide a global perspective that would help better understand the current legal culture of Quebec, Argentina, and to some extent, other American jurisdictions that

417 TAU ANZOÁTEGUI (2007) 162 and CHÁNETON (1937) Vol. 2 p. 344.

418 LEVAGGI (2005) 247 and SALERNO (1974) 207.

419 CHÁNETON (1937) Vol. 2 p. 344.

420 LEVAGGI (1979) 78 and TAU ANZOÁTEGUI (1977b) 278.

421 LEVAGGI (1979) 84–85 and TAU ANZOÁTEGUI (1988) 623.

422 TAU ANZOÁTEGUI (1977b) 277 and 282.

423 TAU ANZOÁTEGUI (1977c) 114–115.

424 TAU ANZOÁTEGUI (1977b) 395.

425 Moreno (1873) v. See also, LEVAGGI (2005) 247.

426 TAU ANZOÁTEGUI (1974) 241.

427 TAU ANZOÁTEGUI (2007) 20, TAU ANZOÁTEGUI (2008) 21, and TAU ANZOÁTEGUI (2011) 99.

428 TAU ANZOÁTEGUI (1977c) 141, LEVAGGI (1979) 120, LEVAGGI (2005) 249, and DÍAZ COUSELO (2009) 1–2.

429 TAU ANZOÁTEGUI (1977c) 141.

pursued codification during the nineteenth century. Codification developed within social and legal contexts that were replicated throughout different parts of the Americas. There was a circulation of legal ideas that linked both continents, while also linking jurisdictions within the continents. Different political and social backgrounds provided different scenarios for codification, however. There are common legal bases and temporal parallels amongst jurisdictions, yet each jurisdiction merits its own study.<sup>430</sup> This paper focused on the salient similarities between the development and application of *libraries* in Quebec and Argentina: there are differences that ought to be subject to further study.

The paper first addressed the codification processes in Quebec and Argentina. The works of the Codifying Commission and of Vélez were analyzed individually, identifying similarities and differences in their products. It was also shown that European legal elaborations (*e. g.*, legislative acts, doctrine) were used as formal sources in the Americas by drafters of codes, and that some of those European materials reached at the same time the Northern and Southern corners of the American continent.

Bibliographical information on the life and legal production of Lorimier and Varela was provided in the second part of the paper. Lorimier and Varela had striking aspects in common, though the most significant was that they were part of the elite that played leading roles in the shaping of local legal cultures. These two jurists were the men behind the mirrors that reflected the normative transfers from Europe to the Americas. The contents of their *libraries* clearly stated that drafters in the Americas highly regarded European sources.

The paper then focused on the formal aspects of the *libraries* and the impact they had within their legal contexts. These unique scholarly works made access to European sources more expedite and assisted legal operators in their activities. *Libraries* coexisted with glossed editions of codes, however. Both types of works played important roles in the delimitation of the positivistic approaches to law as experienced in each jurisdiction. Finally, the paper also showed that even though 150 years have passed since their publication, the *libraries* are still consulted in both jurisdictions.

The exercise of comparative legal history helped create awareness on the attempt that American jurists made to discover the sources of local

430 TAU ANZOÁTEGUI (2008) 16.

provisions. Those sources had mutated to become part of the local *ethos* even when they could be traced, with the help of the *libraries*, back to Europe. Even when there was interest in producing autonomous codifications, the interest in European sources had a pan-American scope. It must be noted, however, that codification was not limited to normative transfers in the Americas, it also extended to intellectual challenges regarding creation and adaptation.

## VII. Appendix: Extracts as Reflections of Transfers

The contents of the *libraries* can be best illustrated by means of extracts randomly selected from their many pages. Articles on *Filial Honor and Respect* provide an example of how *libraries* reproduced formal sources, these being occasionally the same. Article 371<sup>431</sup> of the *Code Napoléon* is amongst the formal sources for the Quebec and the Argentine articles on *Filial Honor and Respect*. This article reads, in an English translation adopted by the Louisiana Code, that “a child whatever be his age; owes honor and respect to his father and mother.”<sup>432</sup> That provision was replicated in the Quebec and Argentine texts. For example, the Quebec Code dealt with *Filial Honor and Respect* in article 242,<sup>433</sup> while its Southern counterpart dealt with it in article 266.<sup>434</sup>

Lorimier and Varela provided transcriptions of relevant formal sources for the articles of their respective codes. On occasion, those formal sources were traced back to Europe, though not necessarily to the same jurisdiction of origin. The historical legal background helps explain that in numerous instances Vélez looked for precedents in Castilian legal elements; while the Codifying Commission in Quebec looked for precedents in French

431 Code civil des Français, Edition Originale et Seule Officielle (1804) 69.

432 Article 233, Civil Code of the State of Louisiana (1825) 70.

433 Article 242 of the Quebec Code reads in English: A child, whatever may be his age, owes honor and respect to his father and mother. BELLEFEUILLE (1866) 52.

434 Article 266 of the Argentine Code reads in English: Children owe respect and obedience to their parents. They are bound, even if emancipated, to care for their parents in old age, in cases of dementia or sickness, and to provide for their needs in all circumstances of life in which their assistance is indispensable. Other legitimate ascendants have rights to the same cares and assistance. Ley 340 (1869) 532. The article is referred to as III in the work of Varela, following the project presented by Vélez.

elaborations, which could be grounded on Roman law. The example provided by the article on *Filial Honor and Respect* illustrates that both *libraries* included transcriptions of the *Code Napoléon*, the Québécois as part of a final transcription, the Argentine as part of a first transcription. The Quebec *library*, however, also included transcriptions of, amongst others, parts of the *Corpus Iuris Civilis*, and passages from the works of Pothier and Domat.<sup>435</sup> The Argentine *library*, different from the one in Quebec, included transcriptions of the codes of Sardinia and Chile, of the work of García Goyena, and of the laws of the Castilian *Siete Partidas*.<sup>436</sup> The *libraries* were therefore able to act as mirrors, and efficiently reflect the normative transfers that took place from Europe to the Americas.

435 See *infra* VII.A.

436 *Id.*

LA BIBLIOTHÈQUE  
DU  
**CODE CIVIL**  
DE LA  
**PROVINCE DE QUEBEC**  
(CI DEVANT BAS-CANADA)  
OU RECUEIL

COMPRENANT ENTRE AUTRES MATIÈRES :

1. Le Texte du Code en Français et en Anglais.
2. Les rapports officiels de MM. les Commissaires chargés de la codification.
3. La citation au long des autorités auxquelles réfèrent ces Messieurs, à l'appui des diverses parties du Code, ainsi que d'un grand nombre d'autres autorités.
4. Des tables de concordance entre le Code Civil du Bas-Canada et ceux de la France et de la Louisiane.

PAR

**CHS. C. de LORIMIER ET CHS. A. VILBON,**

AVOCATS.



**MONTREAL :**

DES PRESSES A VAPEUR DE LA MINERVE NOS. 212 & 214 RUE NOTRE-DAME.

1873

**CONCORDANCIAS**  
Y  
**FUNDAMENTOS**

**DEL**  
**CÓDIGO CIVIL ARGENTINO**

**POR**  
**LUIS V. VARELA**  
(ABOGADO)

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**TOMO V**

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**BUENOS AIRES**

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**H. y M. VARELA, Editores.**

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**1874**

## [ARTICLE 242.]

## TITRE HUITIÈME.

## DE LA PUISSANCE PATERNELLE

242. L'enfant, à tout âge, doit honneur et respect à ses père et mère.

## TITLE EIGHTH.

## OF PATERNAL AUTHORITY.

242. A child, whatever may be his age, owes honor and respect to his father and mother.

\* *ff., de obsequiis parentibus,* } Liberto et filio semper ho-  
*Lib. 37, tit. 15, L. 9.* } nestra et sancta persona patris  
 ac patroni videri debet.

\* *ff., de in jus vocando,* } Parentes naturales in jus vocare  
*Lib. 2, tit. 4, L. 6.* } nemo potest: una est enim omnibus  
 parentibus servanda reverentia.

\* *Nouvelle. 42, c. 2.* } Si verò contigerit ex prioribus nuptiis  
 inculpabilibus filios esse ei, aut nepotes  
 fortè, aut ulterius: paternam moxilli accipiant successionem,  
 suæ quidem potestatis patris supplicio facti, pascentes autem  
 eum, et alia necessaria præbentes. Nam licet legum contemp-  
 tor et impius sit, tamen pater est.

\* *Pothier, mariage,* } Les enfans sont obligés, d'aimer et  
*No. 389.* } d'honorer leurs père et mère, de leur  
 obéir, et de les assister dans leurs besoins, selon leur moyen.

L'obéissance que les enfans doivent à leurs père et mère, est sans bornes, tant que dure la puissance paternelle. Ils doivent pendant ce temps obéir à leurs père et mère dans toutes les choses qu'ils leur commandent pourvu que ce qu'ils leur commandent ne soit pas contraire à la loi de Dieu: mais lorsque les enfans sont sortis de la puissance paternelle, qui finit dans le pays coutumier par la majorité des enfans,

## ARTICULO III

Los hijos deben respeto y obediencia á sus padres. Aunque estén emancipados están obligados á cuidarlos en su ancianidad, en el estado de demencia ó enfermedad, y proveer á sus necesidades en todas las circunstancias de la vida, en que le sean indispensables sus auxilios. Tienen derecho á los mismos cuidados y auxilios los demás ascendientes legítimos.

- § I Código Francés.  
 II Código Sardo.  
 III Código de Chile.  
 IV GOYENA. Proyecto de Código para España.  
 § V Leyes del tit. 19, partida cuarta.

§ I *Este artículo concuerda con el que lleva el número 371 en el CÓDIGO CIVIL DE LOS FRANCESES, que traducido, es como sigue:*

*El hijo á cualquiera edad debe veneracion y respeto á su padre y á su madre.*

§ II *Concuerda tambien este artículo con el que, en el CÓDIGO CIVIL DEL REINO DE CERDEÑA, lleva el número 210 que traducimos. Es como sigue:*

Los hijos, en cualquiera edad, estado, condicion, que se encuentren, deben honrar y respetar á sus padres.

§ III *Aunque el Dr. Velez Sarsfield no lo dice, este artículo está tomado de los que en el CÓDIGO CIVIL DE CHILE, llevan los números 219, 220 y 221 que son como siguen:*

Art. 219—Los hijos legítimos deben obediencia y respeto á su padre y su madre; pero estarán especialmente sometidos á su padre.

Art. 220—Aunque la emancipacion dé al hijo el derecho de obrar independientemente, queda siempre obligado ó cuidar de los padres en su ancianidad, en el estado de demencia, y en todos los estados de la vida en que necesitaren sus esfuerzos.

## [ARTICLE 242.]

ou par le mariage qu'ils ont contracté de leur consentement, en ce cas, ils peuvent vivre dans l'indépendance de leurs père et mère, pourvu qu'ils ne s'écartent pas du respect qu'ils leur doivent, et qu'ils aient une complaisance raisonnable pour leur volontés.

\* *Pothier, des personnes, } On a mis autrefois en question*  
*tit. VI, sec. 11. } si, dans le pays coutumier Fran-*  
 çais, il y avait une puissance paternelle. Quelques auteurs ont avancé qu'il n'y en avait point, on ne peut néanmoins douter qu'il n'y en ait une. La coutume d'Orléans en fait mention expresse dans la rubrique du tit. 9. Elle parle aussi en l'art. 158, d'émancipation ; ce qui suppose une puissance paternelle : mais cette puissance, telle qu'elle a lieu dans le pays coutumier, est entièrement différente de celle que le droit romain accordait aux pères sur leurs enfants, dont le terme et la durée étaient sans bornes, et qui était, *quasi quoddam jus domini*, semblable à celle que les maîtres avaient sur leurs esclaves.

Dans nos pays coutumiers, la puissance paternelle ne consiste que dans deux choses :

1o. Dans le droit que les père et mère ont de gouverner avec autorité la personne et les biens de leurs enfants, jusqu'à ce qu'ils soient en âge de se gouverner eux-mêmes et leurs biens. De ce droit dérive la garde noble et bourgeoise ;

2o. Dans celui qu'ils ont d'exiger de leurs enfants certains devoirs de respect et de reconnaissance.

De la première partie de la puissance paternelle, naît le droit qu'ont les père et mère de retenir leurs enfants auprès d'eux, ou de les envoyer dans tel collège, ou autre endroit où ils jugent à propos de les envoyer pour leur éducation.

De là il suit qu'un enfant soumis à la puissance paternelle, ne peut entrer dans aucun état, se faire novice, faire profession religieuse contre le consentement de ses père et mère,

Art. 221—Tienen derecho al mismo socorro todos los demás ascendientes legítimos, en caso de inasistencia ó de insuficiencia de los inmediatos descendientes.

§ **IV** *Concuerda tambien este artículo con el que lleva el número 143 en el PROYECTO DE CÓDIGO PARA ESPAÑA, del DR. GOYENA, que con el comentario del mismo autor hemos transcrito en el artículo precedente.*

§ **V** *El Codificador Argentino cita como concordantes de su artículo; las leyes del tit. 19, part. 4.ª, que es como siguen:*

Piedad, e debdo natural, deuen mouer a los padres, para criar a los fijos, dandoles, e faziendoles lo que es menester, segund su poder. E esto se deuen mouer a fazer, por debdo natural. Ca si las bestias (\*) que non han razonable entendimiento, aman naturalmente, e crian sus fijos, mucho mas lo deuen fazer los omes, que han entendimiento, e sentido, sobre todas las otras cosas. E otrosi los fijos tenudos son naturalmente, de amar, e temer (†) a sus padres, e de fazerles honra, e seruicio, e ayuda, en todas aquellas maneras que lo pudiesen fazer. E pues que, en los dos titulos ante deste, fablamos del poderio que han los padres sobre los fijos, e de las cosas por que se puede toller; queremos aqui decir, de como los padres los deuen criar. E primeramente mostrar que cosa es criança, e que fuerça a. E por quales razones, e en que manera, son tenudos los padres, de la fazer a sus fijos, maguer non quieran. E quales son tenudos de fazer esto. E por que razones se pueden escusar los padres, de los non criar, si non quisieren.

**LEY I**—Criança, es vno de los mayores bien fechos, que vn home puede fazer a otro, porque todo home se mueue a la fazer con gran amor que ha aquel que cria, quier sea fijo, o otro ome extraño. E esta criança a muy gran fuerça, e señaladamente la que faze el padre al fijo: ca como quier que lo ama naturalmente,

(\*) Todos los animales están dotados de ciertos instintos por los que se dirigen á la conservacion de su especie, que dice Aristóteles.

(†) Advertase que no dice por qué derecho natural están obligados los hijos á educar á los padres, porque esta educacion no es de derecho natural, sinó que se induce por la misma razon natural.

## [ARTICLE 242.]

sous la puissance desquels il est. Cela a été jugé contre les Jésuites, au profit de Me. Airault, lieutenant-général d'Angers, par arrêt de 1587 ; contre les Feuillans, par arrêt du 10 Août 1601 ; contre les Capucins, au profit du président Ripault, par arrêt du 24 Mars, 1604. Ces arrêts sont fondés en grande raison. L'état religieux n'est que de conseil évangélique ; or il est évident qu'on ne peut pas pratiquer un conseil évangélique par le violement d'un précepte, tel qu'est celui de l'obéissance à ses parents, qui nous est prescrite par le quatrième commandement de Dieu. D'ailleurs, la profession religieuse, quoique bonne et utile en soi, ne convient pas néanmoins à tout le monde : tous ne sont pas appelés à cet état. Or les père et mère sont présumés être plus en état de juger si leurs enfans sont appelés ou non à cet état, que leurs enfans, qui, n'étant point encore parvenus à la maturité de l'âge, ne sont pas encore capables de juger par eux-mêmes de l'état qui leur convient.

Il faut excepter de notre règle le service du Roi, auquel les enfans de famille peuvent valablement s'engager contre le consentement de leurs père et mère. L'intérêt public l'emporte sur l'intérêt particulier de la puissance paternelle.

Dé la première partie de notre principe, naît aussi le droit d'une correction modérée, qu'ont les père et mère sur leurs enfans. Ce droit de correction, dans la personne du père, va jusqu'à pouvoir, de sa seule autorité, faire enfermer ses enfans dans des maisons de force, quand il n'est pas remarié. Lorsqu'il est remarié, il ne le peut sans ordonnance du juge qui, pour en accorder la permission, doit s'enquérir de la justice des motifs que le père allègue pour faire enfermer ses enfans. La raison est que, quand un père est remarié, on n'a pas tant lieu de présumer de la justice de ses motifs, arrivant assez souvent, comme dit la loi 4, ff. de inoff. testam. que des pères *noveroalibus delinimentis, instigationibusque corrupti, malignè contra sanguinem suum judicium inferunt.*

porquel engendro mucho mas le cresce el amor, por razon de la criança que façe en el. Otrosi el fijo es mas tenuto de amar, e de obedescer al padre, porque el mismo quiso leuar el afan, en criarle, ante que darle a otro.

**LEY II**—Claras razones, e manifestas son, por que los padres, e las madres, son tenudos de criar a sus fijos. (\*) La vna es, mouimiento natural, por que se musuen todas las cosas del mundo a criar, e guardar, lo que nascen dellas. La otra es, por razon de amor que an con ellos naturalmente. La tercera es, porque todos los derechos, temporales (\*\*) e spirituales, se acuerdan en ello. Ela manera en que deuen criar los padres á sus fijos, e darles lo que les fuere menester, maguer non quieran, es esta: que les deuen dar que coman, e que beuan, e que vistan, e que calcen, e lugar do moren, e todas las otras cosas que les fuere menester, sin las quales non pueden los omes beuir. E esto deue cada vno fazer segund la riqueza, e el poder que ouiere; catando todavia la persona daquel que lo deue recibir (†), en que manera le deuen esto fazer. E si alguno contra esto fiziere, el judgador de aquel lugar lo deue apremiar, prendandolo o de otra guisa, de manera que lo cumpla, assi como sobredicho es. Empero dezimos, que de mientra quel padre criare, e proueyere su fijo, si fiziere el fijo alguna debda que non meta en pro del padre, o que la saque sin su mandado, que non es el padre tenuto de la pagar. Otrosi dezimos, que los fijos deuen ayudar á proueer a sus padres (‡), si menester les fuere, pudiendolo ellos fazer; bien assi, como los padres son tenudos á los fijos.

**LEY III**—Nodrescer, e criar, deuen las madres a sus fijos que fueren menores de tres años (‡‡), e los padres a los que fueren mayores

(\*) La carga de alimentar pasa subsidiariamente á los herederos.

(\*\*) Declárase aqui lo que se llame *alimentos*. El principio de la vida humana se halla en el agua, en el pan, y en el vestido, y en la casa que protege las debilidades. *Ecles*, c 36. v. 23.

(†) Los alimentos se aprecian por la condicion de la persona, á quien se suministran, soldado, rústico ó doctor, jóven ó anciano.

(‡) Si el padre se halla destruido, debe el hijo mandar e alimentos, y aun esto procede quando el padre sea penado por el propio delito.

(‡‡) Esto se entiende segun lo restringe Baldo, de los hijos legítimos y naturales, segun él, si fuesen espúreos sin distincion de edades, están los padres obligados á mantener á los hijos segun sus facultades.

## [ARTICLE 242.]

Les femmes ont aussi besoin de l'autorité des Juges, pour faire enfermer leurs enfans dans des maisons de force. La faiblesse de leur jugement et le caractère d'emportement, assez ordinaire à ce sexe, empêche qu'on ne puisse compter sur le jugement de la mère, comme sur celui du père. Ce sont les distinctions qu'on trouve dans un arrêt de 1695. V. le t<sup>o</sup>m. 5, Journ. des Aud.

La puissance paternelle, quant à la première partie finit non seulement par la mort naturelle ou civile du père ou de l'enfant, mais encore par la majorité de l'enfant, par son mariage même avant vingt-cinq ans et par l'émancipation.

Observez que, quoique parmi nous, la puissance paternelle appartienne à la mère comme au père, en quoi notre droit diffère du droit romain, qui ne l'accordait qu'au père, néanmoins la mère ne peut exercer les droits dont nous venons de parler, qu'au défaut du père ; c'est-à-dire, après sa mort, ou dans le cas auquel, pour sa démence, ou son absence, il ne pourrait pas l'exercer. Hors ces cas, la puissance de la mère est exclue par celle du père, la mère étant elle-même sous la puissance de son mari, sans lequel elle ne peut rien faire ; elle n'en peut exercer aucune sur ses enfans, si ce n'est du consentement et sous le bon plaisir de son mari.

La puissance paternelle, quant à la seconde partie, ne peut finir que par la mort naturelle du père ou de ses enfans ; car des enfans ne peuvent jamais être dispensés des devoirs de reconnaissance et de respect, dans lesquels elle consiste.

C'est de la puissance paternelle, considérée quant à cette seconde partie, que dérive l'obligation où sont les enfans de requérir le consentement de leurs père et mère, pour se marier.

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\* *Domat, Lois civiles, Droit public,* } La première distinction  
*part. 2, liv. 1, tit. 1, sec. 1, N. 2.* } qui assujettit des personnes à d'autres, est celle que fait la naissance entre les parens

desta edad, Empero, si la madre fuesse tan pobre que non los pudiesse criar, el padre es tenuto de darle, la que ouiere menester para criarlos. E si acaesciesse, que se parta el casamiento por alguna razon derecha, aquel por cuya culpa se partió es tenuto de dar, de lo suyo, de que crien los hijos, si fuere rico, quier sean mayores de tres años, o menores, e el otro que no fue en culpa, los deue criar, e auer en guarda. Pero is la madre los ouiesse de guardar, por tal razon como sobredicha es, e se casasse, estonce non los deue auer en guarda: nin es tenuto el padre, de dar a ella ninguna cosa por esta razon: ante deue el rescibir los hijos en guarda, e criarlos, si auiere riqueza con que lo pueda fazer.

LEY IV—Pobredad escusa á las vegadas á los homes, que non fagan algunas cosas, que eran tenudos de fazer de derecho. E porende, maguer diximos en la ley ante desta, que el que era en culpa por que se partió el casamiento, que esse era tenuto de dar al otro de lo suyo, con que criasse sus hijos que ouiesse de so vno raaon y ha por non seria assi. Ca si aquel fuesse pobre, e el otro rico, estonce el que ha de que lo pueda fazer, deue dar de que se crien los hijos. E si el padre, o la madre, fuessen tan pobres (\*) que ninguno dellos non ouiesse de que los criar, si el abuelo, ó visabuelo de los mogos, fueren ricos, qualquier delios (†) es tenuto de los criar, por esta razon: porque assi como el fijo es tenuto de proneer á su padre o a su madre, si vinieren á pobreza; o a sus abuelos, e a sus abuelas, e a sus visabuelos, e a sus bisabuelas, que su ñen por la liña derecha, otrosi es tenuto cada vno dellos, de criar a estos mogos sobredichos, si les fuere menester, que descinden, (‡) otrosi por ella.

LEY V—Engendrán 'os cmes hijos, en sus mujeres, legítimos, e

(\*) Aprúebase aquí la opinion de Jacobo de Ara y Bartolo, que si alguno tiene abuelo y padre rico, antes ha de prestar los alimentos el padre que el abuelo, más se han de pedir á este, cuando no tenga el padre.

(†) Antes los ascendientes de la línea masculina y subsidiariamente los descendientes de la femenina, por donde no la madre, sino el padre es tá obligado á mantener al hijo, y ella, solo en defecto de este ó de sus ascendientes.

(‡) El hermano está obligado á mantener á su hermano pobre, aunque sea natural.

## [ARTICLE 242.]

et les enfans ; et cette distinction fait une première espèce de gouvernement dans les familles où les enfans doivent l'obéissance à leurs parens qui en sont les chefs.

Honora patrem tuum et gemitus matris tuæ ne obliviscaris : memento quoniam nisi per illos natus non fuisses. *Eccle. 7. 29.*

Filii, obedite parentibus per omnia. *Col. 3. 20.*

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\* 4 *Pandectes Frs.*, } Lors de la discussion de ce titre, au  
p. 317 et suiv. } Conseil, M. Béranger proposa de retrancher cet article, comme n'étant point une disposition législative. M. Bigot-Préameneu observa avec beaucoup de justesse que cet article contient le principe, dont les autres ne font que développer les conséquences ; et que, d'ailleurs, il deviendra, en beaucoup d'occasions, un point d'appui pour les juges.

En effet, le fondement et la base de la puissance paternelle sont dans cette révérence et ce respect, que la nature.. que disons nous ? que la Divinité même impose à l'enfant, envers ses père et mère. C'est elle qui lui a dit : Honore, respecte ton père. N'oublie pas les douleurs de ta mère ; car, sans eux tu n'existerais pas. C'est elle qui lui a commandé l'obéissance envers eux. C'est Dieu, lui-même, qui a promis une longue vie, pour récompense, au fils respectueux. Et cette promesse n'a point été vaine. Les observateurs remarquent que les hommes, qui ont donné l'exemple de la piété filiale, sont aussi, généralement, ceux qui sont parvenus à la vieillesse la plus avancée.

Pourquoi donc ce précepte n'aurait-il pas pris place dans la loi civile, dont il est le fondement et le soutien ? Les pères et mères ne sont-ils pas, sur la terre, les images de Dieu même ? Cette similitude n'est point idéale. On trouve en eux, cet amour inépuisable, qui fait tout pour son objet, et

a las vedadas, en otras que lo non son. E en criar estos fijos, ha departamento. Ca los fijos que nascen de las mujeres, que han los omes de bendicion, tambien los parientes que suben por la liña derecha del padre, como de la madre, son tenudos de los criar. Eso mismo es, de los que nascen de las mujeres, que tienen los omes por amigas manifestamente, como en lugar de mujer: non auendo entre ellos embargo de parentesco, ó de Orden de Religion, o de casamiento. Mas los que nascen de las otras mujeres; assi como de adulterio, o de incesto, ó de otro fornicio, los parientes que suben (\*) por la liña derecha, de partes del padre, non son tenudos de los criar, si non quisieren; fueras ende, si lo fizieren por su mesura, mouiendose naturalmente a criarlos, e a fazerles alguna merced, assi como farian a otros estraños, porque non mueran. Mas los parientes que suben por liña derecha de partes de la madre, tambien ella como ellos tenudos son de los criar, si ouieren riquezas con que lo puedan fazer. E esto es, por esta razon, porque la madre siempre es cierta del fijo que nasce della, que es suyo, lo que non es el padre, de los que nascen de tales mujeres:

LEY VI—Comunal derecho es, tambien a los padres, como a los fijos, que el que fiziere algun yerro contra algun dellos; de aquellos por que son llamados los omes, en latin, ingrati; que quier tanto dezir, como ser desconociente, vn ome a otro, del bien que rescibe, o rescibio del: que por tal razon como esta non es tenuto el padre de criar al fijo: nin el fijo, de proouer al padre. E esto seria, como si uno dellos acusasse (†) al otro, e le buscasse atal mal, por quem eresciesse muerte o deshonra, ó perdimiento de lo suyo. Otrosi, quando el fijo ouiesse de lo suyo en que pudiesse biuir; o ouiesse tal menester, por que pudiesse guarescer, vsand<sup>o</sup> del, sin mal estança de si: estonce non es tenuto el padre, de pensar del. Eso mismo dezimos del fijo, que deue fazer contra su padre. Otrosi, quando muere alguno, que fuesse

(\*) Acaso omite hablar del padre, atendida la equidad del derecho canónico, aunque por el civil ni aun por el padre, habian de ser alimentados.

(†) Lo mismo en les demás causas de ingratitud, por las que el hijo puede ser desheredado.

## [ARTICLE 242.]

cependant, éclairé, qui sait se garantir de la faiblesse ; cette bonté inaltérable, qui mesure le châtement, non à la grandeur de la faute, mais à la force du sujet et qui pardonne, même en punissant. Enfin, cette prévoyance, qui caractérise la providence divine.

Dans quel temps était-il plus nécessaire de répéter ce précepte divin, que dans celui où tous les liens de la subordination sont encore relâchés ; où l'on sent la nécessité de rétablir le gouvernement des familles, pour fortifier celui de l'état.

Que dans un temps, où la nouvelle philosophie vient encore semer ses poisons mortels ; où l'on s'érige audacieusement en législateur, pour détruire tous les principes de la législation ; où l'on vient jeter, au sein de la dépravation effrayante des mœurs, de nouveaux sermens de corruption ; enseigner, dogmatiquement, qu'il n'y a ni droit naturel, ni vices, ni vertus ; que ce sont des mots vides de sens, faits pour amuser les enfans ; que les deux seuls principes de la conduite des hommes, sont le plaisir et la peine ; qu'ils ont le droit de faire tout ce qui peut leur procurer l'un, et de repousser tout ce que peut leur faire souffrir l'autre ; et qu'enfin, toute loi est un attentat à la liberté.

Comment peut-on dire de bonne foi, qu'il n'y a point de droit naturel ? Quelle est donc cette voix intérieure, qui me fait sentir, sans que personne me l'ait jamais appris, que l'on ne doit pas m'ôter ce qui m'appartient ; que l'on doit me donner ce qui m'est dû ; que l'on ne doit pas me nuire, comme je ne dois nuire à personne. On demande la définition du droit naturel ? Eh ! n'est-elle pas écrite dans cette maxime : *ne fais pas à autrui, ce que tu ne voudrais pas, qu'on te fit : alteri ne feceris, quod tibi fieri non vis* ? Cette règle n'est-elle pas gravée par la nature même, ou plutôt, par son auteur, dans le cœur de tous les hommes ?

N'est-ce pas d'elle qu'il est surtout vrai de dire avec l'ora-

tenudo de proueer a su padre, e en su testamento estableciesse por su heredero a otro estraño, deseredando á su padre (\*) por alguna derecha razon; este heredero atal non es tenudo de proueer al padre del muerto; fueras ende, (†) si veniesse a muy grand pobreza.

LEX VII.—Bazonandose alguno por fijo de otro, e demandando quel criasse, e proueyesse de lo que era menester, podria acaescer que este atal, que negaria que non era su fijo, porque no lo criasse o por auentura dezirlo y a de verdad, que non seria su fijo. E porrende, quando tal dubda acaesciere, el Juez de aquel lugar, de su officio, deue saber llanamente, e sin alongamiento, non guardando la forma de juyzio que deue ser guardado en los otros pleytos, si es su fijo de aquel por cuyo se razona, o non. E esto deue ser catado por fama de los de aquel lugar, o por qualquier manera otra que lo pueda saber, ó por la jura de aquel que se razona por su fijo. E si fallare por alunas señales, (‡) que es su fijo, deue mandar al otro, que lo crie, e lo prouea. E maguer el Juez mande proueer a este atal, assi como sobredicho es, saluo o finca (‡‡) su derecho a qualquier de las partes, para prouar si es su fijo. ó non.

(\*) Nótese mucho esta ley que dispone que tambien el heredero está obligado a dar alimentos al padre ó al hijo cuando viene á una suma pobreza.

(†) Y si hubiese nietos ú otros obligados por razon de la sangre, á dar alimentos al padre, estará obligado en este caso el heredero estraño? Bartolo se decide por la negativa, á cuya opinion asiento en el caso de esta ley, más que á lo contrario de Alberico, por mas probable.

(‡) No debe darse la sentencia, condenando á dar alimentos inmediatamente que la cuestion se promueve, durante el pleito, á no estar en posesion de la filiacion (Bartolo *in lege si neget, of de libe, agnoz.*)

(‡‡) Si se pronunciasse la no filiacion en el juicio ordinario, no está obligado el padre á los alimentos, ni obstará la sentencia dada en el juicio sumario de alimentos, aunque sea de los atrasados, segun Baldo,

## [ARTICLE 242.]

teur romain, *et hæc judices non scripta sed nata lex, quam non didicimus, accepimus, legimus, sed ab ipsâ naturâ hausimus, arripuimus; ad quam non docti, sed facti, non instituti, sed imbuti sumus.*

Il ne faut ni étudier le droit, ni en sonder les profondeurs, il suffit de consulter son propre cœur, pour sentir que l'on doit honorer, respecter ses père et mère, par la raison, que l'on veut être honoré, respecté par ses enfans.

C'est donc avec grande raison, que les jurisconsultes romains ont dit que la puissance paternelle, quant à son origine est du droit naturel. Cette vérité est justifiée par les yeux, autant que par le sentiment. Il ne faut qu'observer les habitudes des animaux, pour dire avec Paul et Ulpien : *et hoc quoque jure, bellæ utuntur.*

Il est donc vrai que, la loi civile ne crée point la puissance paternelle. Elle est établie par la nature, antérieurement à la loi. Celle-ci ne fait qu'en régler les effets, les étendre, ou les restreindre. Quelle base plus respectable et plus solide, pouvait-elle choisir que le commandement du Décalogue? Que pouvait-elle faire de mieux, que de rappeler et de mettre sous les yeux, ce précepte trop oublié? S'il ne maintient pas toujours les enfans, dans les bornes, dont il ne doivent jamais sortir, il servira, comme l'a dit M. Bigot de Préameneu, de règle aux juges, pour les y faire rentrer.

Quels que soient, en effet, les objets de discussion qu'un enfant puisse avoir, avec ses père et mère; quoiqu'il puisse avoir raison, et qu'il lui soit permis d'exercer, contre eux, les droits qui peuvent lui appartenir; il est toujours obligé de conserver, à leur égard, la révérence et le respect, dont la nature, et la loi, lui imposent l'obligation. Cet article servira de règle aux juges, pour discerner les cas où l'enfant s'écartera de ce devoir; et pour l'en punir, même en lui adjugeant ce qui pourra lui être dû.



## [ARTICLES 242 ET 243.]

\* *Pocquet de Livonnière*, } La puissance paternelle, n'est pas  
*Règles*, p. 30. } inconnue en France, mais elle  
 n'est pas à beaucoup près si étendue que chez les Romains. La puissance paternelle en France n'emporte aucun domaine ni sur la personne ni sur les biens, elle ne consiste qu'en obéissance et révérence que les enfans doivent à leurs pères.

Elle est due à la mère comme au père tant qu'il n'y a point de division entre eux, mais au père préférablement à la mère dans les choses qui ne sont point défendues et sur lesquelles ils ne sont point d'accord. *Loysel*, liv. 1, t<sup>o</sup>m. 1, Règ. 37. *D'Argentré*, sur art. 495, de Bretagne, Gl. 1. *Bacquet*, de Justice, ch. 21, n. 57.

\* *Gin*, } Le vœu de la nature qui identifie les pères et  
 p. 220. } les enfans, est un des principes que les jurisconsultes romains se sont efforcés d'inculquer le plus profondément dans les esprits. La faiblesse des enfans, dans le premier âge, les place sous la dépendance de leurs parens dont la nature les destine à être un jour la consolation et le soutien.

\* *C. L.*, 233 *et* } L'enfant, à tout âge, doit honneur et res-  
*C. N.*, 371. } pect à ses père et mère.



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